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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1979

NO. 79-5601

CARLOS RIVERA GOMEZ

Petitioner

V.

ASTOL CALERO TOLEDO

Respondent.

PETITION OF CARLOS RIVERA GOMEZ FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT AND APPENDIX

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I N T H E

S U P R E M E C O U R T

O F T H E

U N I T E D S T A T E S

OCTOBER TERM, 1979

NO.

CARLOS RIVERA GOMEZ

Petitioner

V.

ASTOL CALERO TOLEDO

Respondent.

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petitioner, Carlos Rivera Gomez, appellant in the court below, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above case on August 7, 1979. That decision affirmed the judgment of the United States District Court for the District of Puerto Rico entered in the above case on October 23, 1978.

OPINIONS BELOW

The unreported opinion and judgment of the United States District Court for the District of Puerto Rico, dated October 23, 1978, dismissing petitioner's complaint against the respondent Astol Calero Toledo, are set forth at page A-1 of the Appendix. The opinion of the United States Court of Appeals for the First Circuit affirming the dismissal is reported at 602 F.2d 1018 and is set forth at page A-4 of the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on August 7, 1979, and this petition for certiorari was filed within 90 days of that date. The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. §1254 (1).

QUESTION PRESENTED FOR REVIEW

Whether the plaintiff in a civil rights action filed under 42 U.S.C. §1983 must allege bad faith on the part of the defendant in order to state a cause of action.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment provides, in pertinent part:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title 42, §1983 of the United States Code provides:

> "Every person who, under color of any statute ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

The petitioner commenced this civil rights action in the District Court for the District of Puerto Rico in July of 1977. Petitioner claimed damages from respondent Astol Calero Toledo, the Superintendent of Police of the Commonwealth of Puerto Rico, and from the Commonwealth of Puerto Rico and the Police of the Commonwealth of Puerto Rico.[1] The case against the respondent was based on 42 U.S.C. §1983, with jurisdiction invoked under 28 U.S.C. §1331.

The claim against the respondent was for violation of the petitioner's substantive and procedural rights to due process of law in connection with his discharge from employment as a police officer. The allegations in his complaint, which is attached hereto at page A-8 of the Appendix, set forth the following facts.

The petitioner had been employed since 1968 as a police officer in the Police Department of the Commonwealth of Puerto Rico. As specifically alleged in the complaint, there is a statute in the Commonwealth which gives a police officer the right to an administrative hearing before the imposition of disciplinary action. The petitioner was

1 The Commonwealth and the Police Department were dismissed and the petitioner did not appeal from that decision.

first suspended and then discharged without such a hearing. The suspension was a retaliatory one, for impermissible reasons which are set forth in detail in the complaint.

During his work, the petitioner discovered that two other police officers had obtained false evidence and offered it in evidence in a pending criminal prosecution. The petitioner reported this matter to a superior officer. As a result of this report, the respondent transferred the petitioner away from his normal duties and assigned him to the police academy with no investigative authority. An investigation by the Legal Division of the Police Department, however, then exonerated the petitioner of any wrongdoing and corroborated his accusations against the other officers.

Subsequently, the petitioner was subpoenaed by the defense lawyer in the criminal case in question and testified concerning the false evidence which had been offered by the two other police officers. Thereafter, and as a result of the petitioner's court testimony, the respondent obtained criminal charges against the petitioner for wiretapping, although he knew that there had already been a judicial determination that any alleged wiretapping had occured prior to the effective date of the stature making it illegal. The courts of Puerto Rico later found no probable cause for these criminal charges.

The suspension and discharge of the petitioner followed on the grounds that he had contested the honesty, integrity and competence of the other officers and for injurious, immoral or disorderly conduct which harmed the Police Department. The complaint specifically alleges that the discharge was based on the same facts upon which the petitioner had already been totally exonerated by the Legal Division.

The District Court granted the respondent's motion to dismiss for the reason that the petitioner had not specifically alleged bad faith on the part of the respondent. Petitioner appealed to the Court of Appeals for the First Circuit, which affirmed the decision of the District Court on August 7, 1979, holding that the plaintiff in an action under 42 U.S.C. §1983 must allege bad faith on the part of the defendant in order to state a valid cause of action.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS BELOW CREATES A CONFLICT IN THE DECISIONS OF THE CIRCUIT COURTS OF APPEALS.

The Court of Appeals below held that because public officials enjoy qualified immunity from suit under §1983, "it follows that a plaintiff must allege as well as prove that a public official acted in bad faith to state a valid cause of action." 602 F.2d,at 1020. Because the complaint failed to explicitly allege bad faith, the Court of Appeals affirmed its dismissal.[2]

The First Circuit alone requires plaintiffs in civil rights cases to plead malice or bad faith on the part of all official defendants in order to state a claim under 42 U.S.C. §1983. However, the decision below is not an isolated decision within the First Circuit, but reflects the developing policy of this Court of Appeals, as reflected in the series of decisions relied upon in the opinion of

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2 The rigidity of this requirement is especially apparent in the present case. As the Statement of the Case makes clear, plaintiff alleged that the Superintendent of Police discharged him for conduct which the Legal Division of the Department had already found was blameless on his part, and failed to hold a hearing prior to discharge despite a specific statutory provision requiring one. One might have thought that if any allegation of bad faith were required it was suggested by the bare facts themselves.

the court below. There are decisions, discussed immediately below, in every other circuit holding that the burden of establishing qualified immunity is on the defendants in §1983 actions. Only in the Fifth Circuit is there any support for the position that plaintiffs have the burden of negativing qualified immunity, and there only in some cases.

Perhaps the most direct conflict is with the Third Circuit Court of Appeals decision in Skehan v. Board of Trustees of Bloomsburg State College, 538 F.2d 53 (3d Cir., en banc, 1976), cert. den. 429 U.S. 979 (1976). A discharged state college teacher filed suit under §1983 for failure to receive a hearing prior to his termination. The court explicitly considered the question of which side has the burden of going forward with evidence and which side has the burden of proof with regard to the issue of qualified immunity. The court analyzed the issue in the light of this Court's decisions in Wood v. Strickland, 420 U.S. 308 (1975) and O'Connor v. Donaldson, 422 U.S. 563 (1975), and squarely held:

> We therefore hold that in §1983 actions the burden is on the defendant official claiming official immunity to come forward and to convince the trier of fact by a preponderance of the evidence that, under the standards of Wood v. Strickland,

> official immunity should attach.
> 538 F.2d at 61-62.

Other Third Circuit decisions are in accord. Safeguard Mutual Insurance Co. v. Miller, 472 F.2d 732 (3d Cir. 1973); Thompson v. Burke, 556 F.2d 231, 239 (3d Cir. 1977). These decisions are squarely in conflict with the First Circuit's rule that the plaintiff must plead and prove bad faith or the absence of qualified immunity.

Probably the leading case on the good faith defense in §1983 actions among lower federal court decisions is Bivens v. Six Unknown Named Agents, 456 F.2d 1339 (2d Cir. 1972). After deciding that federal police agents have no absolute immunity from suit for constitutional deprivations, the court held that such officers would have a defense of good faith:

> And so we hold that it is a defense to allege and prove good faith and reasonable belief in the validity of the arrest and search and in the necessity for carrying out the arrest and search in the way the arrest was made and the search was conducted. Id., at 1348. (emphasis supplied)

That case thus clearly places the burden of raising the defense upon the official defendant. Laverne v. Corning, 522 F.2d 1144 (2d Cir. 1975) is in accord, and explicitly recognizes that the good faith defense and qualified

immunity amount to the same thing in §1983 cases.

The Fourth Circuit held that qualified immunity was a matter of defense and that the burden of proving it was on official defendants in McCray v. Burrell, 516 F.2d 357, 370 (4th Cir., en banc, 1975), cert. granted and later dismissed as improvidently granted on other grounds, 423 U.S. 923, 426 U.S. 471 (1976). In an addendum to the original opinion, the court specifically considered the impact of Wood v. Strickland, supra, on their opinion and held that Wood constituted additional authority for the conclusions of the court on the subject of qualified immunity.

In the Fifth Circuit, the Court of Appeals held in Bryan v. Jones, 530 F.2d 1210, 1213 (5th Cir., en banc, 1976), cert. den. 429 U.S. 865 (1976) that good faith is a defense to a §1983 false imprisonment action and that a plaintiff need not prove its absence to make out a prima facie case. Reimer v. Short, 578 F.2d 621 (5th Cir. 1978), cert. den. __U.S.__, 99 S.C. 1425 (1979) a case involving the claim of deprivation of property without due process of law, is in accord. There the Court of Appeals approved a jury instruction placing the burden of proving the good faith defense by a preponderance of the evidence on the defendants.

However, in the recent case of Cruz v. Beto, 603 F.2d 1178 (5th Cir. 1979), the court held that under some circumstances the plaintiff would have the burden of piercing qualified immunity by pleading and proving an abuse of authority where the defendant was the director of a statewide prison system. The precise impact of the case on pleading requirements is not clear. The court indicated that this burden on the part of plaintiff arose once the defendant had established his qualified immunity by virtue of asserting that his questioned decisions were made as director of the prison based on what he perceived to be a security need of the institution. Id., at 1183. Thus it would seem that plaintiff need not meet this burden in the initial complaint. In addition, although the court held that the burden shifts to the plaintiff in a case of a statewide prison director, it reaffirms that the burden is on the defendant where he is a police officer. Exactly where the line is drawn between these positions is not clear from this case.

To the extent that Cruz v. Beto has changed the law in this area in the Fifth Circuit, the conflict between lower federal courts even more urgently requires

definitive resolution by the Supreme Court.

In Glasson v. City of Louisville, 518 F.2d 899, 907-910 (6th Cir. 1975), cert. den. 423 U.S. 930 (1975), the Sixth Circuit reviewed the decisions in Wood v. Strickland, supra, and Scheuer v. Rhodes, 416 U.S. 232 (1974), and characterized qualified immunity as an "affirmative defense." In accord, Jones v. Perrigan, 459 F.2d 81 (6th Cir. 1972).

The Seventh Circuit explicitly adopted the Second Circuit's definition of the elements of the good faith defense from Bivens v. Six Unknown Named Agents, supra, in Tritsis v. Backer, 501 F.2d 1021 (7th Cir. 1974), citing the language requiring the officer to "allege and prove" the elements of the defense. 501 F.2d at 1022-1023. Other Seventh Circuit cases are in accord in treating qualified immunity as a defense. Brubaker v. King, 505 F.2d 534 (7th Cir. 1974); Boscarino v. Nelson, 518 F.2d 879 (7th Cir. 1975).

The Eighth Circuit has given a particularly clear statement of the matter in Landrum v. Moats, 576 F. 2d 1320 (8th Cir. 1978) cert. den. 439 U.S. 912

(1978):

> Because good faith is dependent on motivation and conduct of the defendant as established at trial, the validity of the defense is ordinarily a question for the jury. Moreover, like the other affirmative defenses originally predicated on the common law, the burden is on the defendant to prove each element of the defense to the jury's satisfaction. Id., at 1329.

In Gilker v. Baker, 576 F.2d 245 (9th Cir. 1978), the Ninth Circuit reversed the district court where it had granted a motion to dismiss at the close of the plaintiff's case. The court held that the plaintiff need only make out a prima facie case of a constitutional violation, and then the burden shifts to the defendant to establish a good faith defense. Donovan v. Reinbold, 433 F.2d 738, 739 (9th Cir. 1970), is in accord, holding that in a suit for an unconstitutional discharge from public employment good faith would be a defense.

In Martin v. Duffie, 463 F.2d 464 (10th Cir. 1972), the Tenth Circuit explicitly considered whether the plaintiff in a false arrest action must negative every possible justification for an arrest without a warrant. The court analyzes the issue in some detail, and squarely holds that the plaintiff need only establish a prima facie case of constitutional deprivation (in this case, a warrentless arrest) and then the burden shifts to the

the defendant to go forward with the evidence of justification. The court held that good faith must be put forward by the officer as a defense.

The District of Columbia Circuit has also explicitly placed the burden of proving qualified immunity on the defendants in §1983 actions. In Dellums v. Powell, 566 F.2d 167 (D.C. Cir. 1977), cert. den. 438 U.S. 916 (1978), reh. den. 439 U.S. 886 (1978), the court held:

> [T]here can be no doubt that state and federal police officers sued under Section 1983 and Bivens, respectively, have available to them a qualified immunity defense, a privilege based on good faith and reasonableness, but that the burden is on the defendant officers to prove it. Id., at 176. (emphasis in original)

In accord, Apton v. Wilson, 506 F.2d 83 (D.C.Cir. 1974); Zweibon v. Mitchell, 516 F.2d 594, 670-671 (1975), cert. den. 425 U.S. 944 (1976).

The cited cases establish that the nearly unanimous rule outside the First Circuit is that the burden of establishing a good faith defense and of asserting qualified immunity is on the defendants in civil rights cases. The decision below is thus in conflict with the other circuits and constitutes an aberration in an extrememly significant area of constitutional law. To the extent the decision below is supported by the Fifth Circuit

decision in Cruz v. Beto, supra, the need for Supreme Court resolution of the conflict is even greater. This Court should grant the petition for certiorari and reverse the decision below so that pleading requirements in civil rights cases will be uniform throughout the circuits.

II. THE DECISION OF THE COURT OF APPEALS BELOW IS IN CONFLICT WITH THE APPLICABLE DECISIONS OF THE SUPREME COURT.

The question of whether a plaintiff in a civil rights action must plead bad faith or maliciousness on the part of the defendant is an important federal question which affects the drafting of literally thousands of complaints filed every year. The First Circuit has now held that every plaintiff in an action under 42 U.S.C. §1983 must allege bad faith or the complaint will be dismissed. This position is a complete departure from the prior decisions of the Supreme Court and certiorari should be granted so that the decision of the First Circuit can be reversed.[3]

The Supreme Court held in Monroe v. Pape, 365 U.S. 167, 187 (1961), that a civil rights plaintiff did not have to allege a wilful violation of constitutional rights or a specific intent to violate constitutional rights in order to state a cause of action.

3 Petitioner is of the opinion that the prior decisions of this Court clearly compel the conclusion that the burden of establishing qualified immunity is on a defendant in a §1983 action. In the event the Court disagrees and is of the opinion this issue has not been resolved, the need to grant certiorari and settle the issue is even more apparent.

This rule of pleading was reaffirmed in Pierson v. Ray, 386 U.S. 547 (1967), where the Court held that defendants in a §1983 action for false arrest would have available to them the defense of good faith and probable cause. The Court noted the difference between this matter of defense and the plaintiff's burdens in the drafting of the complaint, with specific reference to Monroe v. Pape:

> We also held that the complaint should not be dismissed for failure to state that the officers had 'a specific intent to deprive a person of a federal right,' but this holding, which related to the requirements of pleading, carried no implications as to which defenses would be available to police officers. 386 U.S. at 556.

The Court then held that the defense of good faith was available to the defendant officers, but specifically ruled that the count in question should not be dismissed and the issue of good faith should be submitted to the jury. Id., at 557.

The court below nonetheless held that the plaintiff must negative the existence of the defendant's qualified immunity in the complaint. In so doing, the court mistakenly granted the defendant a presumption,

in effect, that he had acted in good faith:

> Where, as here, a public official is being sued for action taken in his official capacity, it is assumed that he wears a cloak of qualified immunity and the complaint must allege and specify facts that show bad faith or state why in this particular case the cloak was shed. 456 F.2d, at 1020.

This proposition is in direct conflict with the decision of the Supreme Court in Scheuer v. Rhodes, 416 U.S. 232 (1974), in which the Court held there is no automatic assumption that defendant officials in §1983 actions have acted in good faith. There, the Court reversed the dismissal of a §1983 case on the pleadings, specifically holding that the good faith of the defendant officials could not be taken for granted:

> In dismissing the complaints, the District Court and the Court of Appeals erroneously accepted as a fact the good faith of the Governor . . . There was no evidence before the courts from which such a finding of good faith could be properly made and, in the circumstances of these cases, such a dispositive conclusion could not be judicially noticed. Id., at 250-251.

The decision of the Court of Appeals below is in flat contradiction to this language from Scheuer v. Rhodes.

The nature of the qualified immunity defense was

elaborated upon by the Court in Wood v. Strickland, 420 U.S. 308 (1975). That case held that, although malice may be a sufficient basis for liability in a case in which the constitutional law applicable to the conduct complained of was unclear, where the applicable constitutional principles were settled a plaintiff need not show malice on the part of an official defendant to prove a claim. Thus the Court reversed the directed verdicts that had been granted by the district court on the ground of immunity, despite the district court's conclusion that there was no evidence of malice.

The two most recent cases by the Court on the question of qualified immunity specifically denominate the matter as one of defense. In Procunier v. Navarette, 434 U.S. 555 (1978), the Court affirmed the granting of a summary judgment in a case where the defendants had raised the defense by motions supported with affidavits. Both the majority opinion of the Court, id., at 566 and the dissenting opinion of Justice Stevens, id., at 569, refer to qualified immunity as a defense, with Justice

Stevens labelling it as an "affirmative defense."[4]

Finally, in Butz v. Economou, 438 U.S. 478 (1978), the Court, in the context of a lengthy historical analysis of the immunity defense, specifically explains that qualified immunity has historically developed as a judicially created defense to the statutory cause of action under §1983:

> It has been observed more than once that the law of privilege as a defense to damage actions against officers of Government has 'in large part been of judicial making.'. . .Section 1 of the Civil Rights Act of 1871--the predecessor of §1983--said nothing about immunity for state officials. It mandated that any person who under color of state law subjected another to the deprivation of his constitutional rights would be liable to the injured party in an action at law. This Court nevertheless ascertained and announced what it deemed to be the appropriate type of immunity from §1983 liability in a variety of contexts. Id., at 502-503.

These cases make abundantly clear that qualified immunity is a matter of defense. If there is any obligation to mention it in the pleadings at all, it is on the defendant under Rule 8(c) of the Federal Rules of Civil Procedure. Thus this Court should grant ceritorari to reverse the decision of the First Circuit and remove this substantial and improper pleading hurdle from plaintiffs in that Circuit.

4 In Procunier the Court was considering only the negligence count of the complaint. The allegation of negligence, and hence a lack of malice, was insufficient to overcome the defense raised by the officials in this case because the constitutional right in issue was not clear at the time the alleged acts took place. Thus Procunier is an application of only one branch of Wood V. Strickland, supra. In the present case, the constitutional right was clear and thus proof of malice is unnecessary. Plaintiff alleged a specific statute which gave him the right to a pre-termination hearing. Thus, local law had clearly given him enough of an entitlement to his continued employment to implicate due process protections. Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 564 (1972); Arnett v. Kennedy, 416 U.S. 134 (1974); Goss v. Lopez, 419 U.S. 565, 573 (1975). There is nothing in this record to suggest that Puerto Rican law in any way contravened the clear implication of the statute cited in plaintiff's complaint. Cf.Bishop v. Wood, 426 U.S. 341 (1976). In addition, although the petitioner did not specifically mention the First Amendment in his complaint, the facts pleaded establish that the discharge was in retaliation for his public testimony against other police officers and thus in violation of his First Amendment rights. This was well settled law by the time of the events complained of in this case. Pickering v. Board of Education, 391 U.S. 563 (1968).

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Honorable Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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APPENDIX

THE DOCUMENTS LISTED AS APPENDICES TO THIS PETITION HAVE BEEN REPRINTED AND APPEAR IN THE APPENDIX VOLUME ITSELF.

Supreme Court, U. S.
FILED
FEB 19 1980
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5601

CARLOS RIVERA GOMEZ,

Petitioner

—v.—

ASTOL CALERO TOLEDO,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 5, 1979
CERTIORARI GRANTED JANUARY 14, 1980

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RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
1977		
July 14	1	Complaint, filed
Nov. 10	6	Answer to the complaint, filed
1978		
June 15	8	Plaintiff's interrogatories to defendants, filed
July 3	12	Co-defendants Astol Calero Toledo, etc., Motion to dismiss with memorandum of law in support of motion to dismiss, filed
July 3	13	Co-defendant Astol Calero Toledo's Motion to hold plaintiff's interrogatories in abeyance until a decision has been reached on defendants' motion to dismiss, filed. 7-14-78, Denied, (J. Torruella)
July 21	15	Defendants' answers to plaintiff's interrogatories, filed
Aug. 29	21	Plaintiff's motion in opposition to motion to dismiss, filed
Oct. 23	22	Decision and Order dismissing case. Judgment shall be entered accordingly, filed and entered (J. Torruella)
Oct. 24	23	Judgment dismissing complaint, filed and entered
Nov. 3	24	Plaintiff's motion requesting reconsideration of court's order dismissing case, etc., filed
Nov. 9	25	Defendants' motion in opposition to plaintiff's motion requesting reconsideration of order dismissing case, filed 11-3-78: 11-6-78 Denied (J. Torruella)
Nov. 24	26	Plaintiff's notice of appeal of judgment, filed

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil No.: 77-1011

Plaintiff demands trial by jury

CARLOS RIVERA GOMEZ individually and on behalf of the Community Property Regime, PLAINTIFF

vs.

ASTOL CALERO TOLEDO, THE COMMONWEALTH OF PUERTO RICO, POLICE OF THE COMMONWEALTH OF PUERTO RICO, DEFENDANTS

COMPLAINT—Filed July 14, 1977

TO THE HONORABLE COURT:

COMES FORTH plaintiff represented by his undersigned attorney and respectfully states and prays:

1. Jurisdiction in the subject matter of this case is invoked pursuant to 42 USCA 1983 and 28 USCA 1343.

2. Plaintiff is a citizen of the United States and a resident of this judicial district.

3. Defendant Astol Calero Toledo at all material times herein was the Superintendent of the Police of the Commonwealth of Puerto Rico, hereinafter referred to as Police of Puerto Rico, and acted in said official capacity by virtue of authority vested under Law No. 77 of July 1, 1956, as amended, and regulations issued thereunder.

4. Plaintiff has been engaged in the public service with the Police of Puerto Rico since May 18, 1968, as agent, Bureau of Criminal Investigations, (Negociado de Investigación Criminal) formerly Criminal Investigation Corps. (Cuerpo de Investigación Criminal).

5. In or about the month of April, 1975, plaintiff, acting within his official duties, submitted to his Supervisor, Agent Luis Murphy Maldonado, sworn statement containing facts pertaining to false evidence obtained and

offered as admissible evidence in Law, by two other agents in a criminal case under their investigation.

6. Defendant Astol Calero Toledo ordered an official investigation pertaining to the facts and/or information given by plaintiff in the aforementioned sworn statement to his supervisor.

7. Subsequent to having the aforementioned sworn statement—plaintiff was summarily transferred from the Criminal Investigation Corps for the Southern Area to Police Headquarters in San Juan. A few weeks later plaintiff was again transferred to the Police Academy at Gurabo, Puerto Rico, as instructor, wherein plaintiff had no investigative authority.

8. As a result of the investigation ordered referred to in paragraph 6, the Legal Division of the Police of Puerto Rico, with date of June 20, 1975, rendered a written report to defendant Astol Calero Toledo, which report, totally exonerated plaintiff from the commission of any improper and/or illegal acts, found as true all facts given by plaintiff in the aforementioned sworn statement and recommended the discharge from the force of the two other agents.

9. In or about the month of April, 1976, during the term of plaintiff's duties at the Police Academy as instructor, plaintiff was subpoenaed by counsel for the defense to give testimony in the criminal case of the Commonwealth of Puerto Rico vs. William Gordon Pagán, Superior Court of Puerto Rico, Ponce Area, wherein plaintiff gave testimony as to his knowledge of said false evidence obtained and offered by two other agents in said criminal action.

10. As a result of plaintiff's Court appearance in the criminal case of the Commonwealth of Puerto Rico vs. William Gordon Pagán, referred to in paragraph 9, criminal charges were brought against plaintiff for the alleged act of wiretapping, in violation of Article 145 of the Puerto Rico Penal Code, which charges were filed upon information and/or evidence given by defendant Astol Calero Toledo.

11. Said criminal charges were filed against plaintiff at a time when it was defendant Astol Calero Toledo's knowledge that the Honorable Judge presiding said criminal proceeding against William Gordon Pagán and previously ruled, within said proceedings, that the acts upon which plaintiff might have been held to answer for a violation of said Article 145, if any, had occurred prior to the date said articles 145 and/or Penal Code had become effective.

12. By letter of May 26, 1976, defendant Astol Calero Toledo suspended plaintiff from employment for the reason given that plaintiff was being investigated.

13. By letter of July 14, 1976, plaintiff was discharged from employment without hearing for the alleged violation of Rules 3 and 26, Chapter 7, Sec. 1, Regulations, Police of Puerto Rico, which rules read as follows:

> *Rule 3*—To contest without any based motives he honesty, integrity and competence of any member of the force or civil officer, or make improper manifestations with the only purpose of denigrating his dignity.
>
> *Rules 26*—To observe an injurious, inmoral or disorderly conduct thus harming the Police Department.

14. That plaintiff's termination of employment is stated in paragraph 13, was based on the same facts upon which plaintiff had been totally exonerated by report rendered to defendant Astol Calero Toledo by the Legal Division of the Police of Puerto Rico at his request on June 20, 1975, attached hereto and made part hereof as Exhibit 1.

15. In or about the month of October 1976, within proceedings of preliminary hearing against plaintiff for the alleged commission of the act of wiretapping, in violation of Articles 145 of the Penal Code of Puerto Rico, the District Court of Puerto Rico and subsequently the Superior Court, upon appeal by the prosecuting attorney found no probable cause against plaintiff for the alleged violation of said article.

16. Plaintiff took and appeal from his discharge by defendant Astol Calero Toledo's letter of July 14, 1976, referred to in paragraph 13, before the Investigation,

Prosecution and Appeals Commission, hereinafter referred to as CIPA, which commission, after hearing, by ruling of December 1, 1976, revoked codefendant Astol Calero Toledo's administrative order discharging plaintiff from employment and ordering his reinstatement to his former position with salaries accrued.

17. That plaintiff's discharge without prior hearing was an act in violation of Law No. 26, of August 22, 1974, which Law which requires the celebration of administrative hearing prior to imposing disciplinary measures against members of the force and/or of his constitutional rights to a procedural due process of law and further violated plaintiff's rights not to be arbitrarily discharged from public employment.

18. That as a result of the acts of defendants herein above complained of plaintiff has suffered and continues to suffer stress, anxiety, embarassment and impairment to his reputation.

WHEREFORE, plaintiff respectfully requests from the Honorable Court that judgment be entered in his favor as follows:

1) Granting plaintiff judgment against defendants in the amount of FIFTY THOUSAND DOLLARS ($50,000.00).

2) Granting plaintiff in addition to compensatory damages, punitive or exemplary damages based upon the deliberate acts of defendants, in the amount of ONE HUNDRED THOUSAND DOLLARS ($100,000.00).

San Juan, Puerto Rico, July 14, 1977.

/s/ Jose Luis Rodriguez Mangual
JOSE LUIS RODRIGUEZ MANGUAL
Cond. Lemans Ofic. #306
Ave. Muñoz Rivera 602
Hato Rey, Puerto Rico 00918

VERIFICATION

I, CARLOS RIVERA GOMEZ, of legal age, married and resident of Ponce, Puerto Rico, after being duly sworn, depose and state:

That I have read the foregoing Complaint; and all of the allegations therein are true to the best of my knowledge and belief.

In San Juan, Puerto Rico, July 14, 1977.

/s/ Carlos Rivera Gomez
CARLOS RIVERA GOMEZ

Affidavit Number: ———

SWORN AND SUBSCRIBED TO before me by Carlos Rivera Gómez, of the personal circumstances above stated, personally known to me, this 14 day of July, 1977, in San Juan, Puerto Rico.

/s/ Ramón A. Alfaro
Clerk

By: /s/ [Illegible]
Dep. Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil No. 77-1011

CARLOS RIVERA GOMEZ, PLAINTIFF

v.

ASTOL CALERO TOLEDO, *et al.*, DEFENDANTS

ANSWER TO THE COMPLAINT—
Filed November 10, 1977

TO THE HONORABLE COURT:

Appearing through their undersigned attorneys without submitting to the jurisdiction of the Court, the defendants hereby submit the following answer to the complaint:

GENERAL ALLEGATIONS

1. This Honorable Court lacks jurisdiction to entertain the action and grant the relief requested.
2. The complaint fails to state a claim against the appearing parties upon which any relief may be granted by the Court.
3. All conclusions of law alleged in the complaint are denied.
4. All factual allegations contained in the complaint, except those specifically admitted below and only as qualified therein, are denied.

SPECIFIC ALLEGATIONS

With respect to each numbered paragraph of the complaint, the defendants allege as follows:

1. The jurisdiction of the Court under the statutes involved is disputed.
2. Admitted.
3. Admitted.

4. Admitted. It is specifically averred, however, that he has not been performing investigative duties during all of this period of employment.

5. It is admitted only that on or about April, 1975 plaintiff made serious imputations regarding two other agents of the C.I.C. The rest of the paragraph is denied and it is specifically averred that plaintiff was not acting within his official duties in making the above imputations.

6. It is admitted only that an official investigation was conducted as a result of plaintiff's imputations. The rest of the paragraph is denied and it is specifically averred that said investigation failed to substantiate plaintiff's imputations and that therein it was recommended that plaintiff not be returned to duty in Ponce, that he be reprimanded in writing and that he be instructed to abstain from involving himself in investigations assigned to other agents.

7. It is admitted only that plaintiff was transferred from Ponce to Police Headquarters in San Juan and later to the Police Academy in Gurabo, as instructor, wherein he had no investigative duties. The rest of the paragraph is denied.

8. Denied.

9. It is admitted that in the criminal case against William Gordon Pagán conducted in March, 1976 plaintiff testified, on behalf of said defendant, that the case against him had been "fabricated" by two other agents and it is specifically averred that, notwithstanding plaintiff's testimony as to "fabrication" by the investigative agents, on March 27, 1976 the jury found the defendant guilty of first degree murder.

10. It is admitted only that as a result of plaintiff's testimony that he had taped telephone conversations he had conducted with one of the agents allegedly involved in the "fabrication", the judge presiding the criminal case ordered that the tapes be produced and subsequently criminal charges were brought against plaintiff for violation of article 145 of the Puerto Rico Penal Code. The rest of the paragraph is denied and it is specifically averred that the charges were filed pursuant to a report

& recommendation of Assistant Prosecuting Attorney Jorge Roberto Feliciano on May 20, 1976.

11. Denied. It is specifically averred that no such ruling was ever made by the Hon. Arturo Cintrón García within the criminal proceeding against William Gordon Pagán.

12. Admitted. It is specifically averred, however, that said action was in accordance with the applicable provisions of law.

13. Admitted. It is specifically averred, however, that said discharge was in accordance with the applicable provisions of Commonwealth law which provide for appeal before the Investigation, Prosecution and Appeals Commission (CIPA) rather than a pre termination hearing as alleged.

14. Denied.

15. Admitted. It is specifically averred, however, that said judicial determination in a criminal proceeding is totally irrelevant to the administrative disciplinary proceedings leading to plaintiff's dismissal three months earlier.

16. Admitted.

17. Denied.

18. Denied.

AFFIRMATIVE DEFENSES

1. The complaint fails to state adequate statutory grounds to support the jurisdiction of the Court over the subject matter of the complaint.

2. The complaint fails to state adequate statutory grounds to support the jurisdiction of the Court over the defendants.

3. The complaint fails to state adequate statutory grounds to support the jurisdictional grounds alleged therein.

4. The complaint fails to state an actual case or controversy cognizable in this Honorable Court.

5. Neither the Commonwealth of Puerto Rico nor the Police of the Commonwealth of Puerto Rico are "pre-

sons" amenable to suit under the provisions of 42 USC § 1983.

6. As Superintendent of Police of the Commonwealth of Puerto Rico, Astol Calero Toledo was merely an alter ego of the Commonwealth of Puerto Rico and thus not a "person" amenable to suit under 42 USC § 1983.

7. The complaint is barred by the provisions of the Eleventh Amendment to the United States' Constitution.

8. The complaint fails to state specific acts of the Superintendent of Police which amount to a deprivation of any of plaintiff's federally protected rights.

9. At all times pertinent to the complaint, defendant Superintendent of Police acted in compliance with the applicable provisions of law and in the good faith performance of his official duties as an executive officer of the Commonwealth of Puerto Rico.

10. Whether or not plaintiff had any property right subject to the due process protection of the federal constitution is a question dependent on the interpretation of Commonwealth law which presents no federal question.

11. The complaint fails to state a federal cause of action against the defendants upon which any relief may be granted by this Honorable Court.

12. Law No. 26 of August 22, 1974 did not require the celebration of an administrative hearing prior to the imposition of disciplinary measures upon members of the police force and thus the dismissal of plaintiff without a pre-termination hearing cannot be construed as violative of his rights to procedural due process.

13. Dismissal of plaintiff was effected after completion of an administrative investigation, in which plaintiff had the opportunity to be heard, and as a result of the recommendations made to the Superintendent of Police pursuant to said investigation.

14. The reinstatement of plaintiff to his position with back pay, effected by the C.I.P.A. upon his appeal in accordance with the applicable provisions of law, establishes beyond doubt that plaintiff was afforded due process of law and that his rights to "liberty" and "property" were adequately protected.

15. The fact that upon appeal the C.I.P.A. revoked the Superintendent of Police does not establish a violation of plaintiff's rights by the latter but, rather, only that the remedies afforded by Commonwealth law are entirely adequate to safeguard a person's property and liberty interests.

16. The Superintendent of Police having acted in strict compliance with the applicable provisions of law and within the bounds of his official authority, he is immune to a suit for damages under 42 USC § 1983.

17. Plaintiff having been reinstated with back pay, no injury to his property or liberty rights can be asserted herein and therefore no damages for their alleged deprivation without due process could possibly be established.

18. The persons conducting the administrative investigation and/or formulating the recommendations thereof are not parties to the present action although they are indispensable pursuant to the Federal Rules of Civil Procedure.

19. Absent the necessary factual allegations to support the equally absent allegations of bad faith and conspiracy, the allegations of the complaint are insufficient to assert a civil rights claim against the Superintendent of Police for, at best, all that could be established thereof is that the Superintendent incurred in administrative error in discharging plaintiff.

20. The actions of the Superintendent of Police herein involved constituted a valid and lawful discharge of his official duties which, particularly after a speedy and adequate administrative remedy rendered plaintiff whole, cannot be utilized as the basis for a civil rights claim in this Honorable Court.

PRAYER

Wherefore, the defendants hereby respectfully request that the complaint be dismissed, that costs and attorney's fees be taxed on plaintiff and that such further relief as the Court may deem just and proper be provided at the sound discretion of this Honorable Court.

In San Juan, Puerto Rico, this 10th day of November, 1977.

MIGUEL A. GIMENEZ MUNOZ
Secretary of Justice

CARLOS A. SHINE
Assistant Secretary of Justice

/s/ Jose A. Gonzalez Gierbolini
JOSE A. GONZALEZ GIERBOLINI
Assistant District Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERO RICO

Civil No. 77-1011

CARLOS RIVERA GOMEZ, PLAINTIFF

vs.

ASTOL CALERO TOLEDO, ET AL., DEFENDANTS

MOTION TO DISMISS—Filed July 3, 1978

TO THE HONORABLE COURT:

Come now co-defendants Astol Calero Toledo, the Commonwealth of Puerto Rico and the Police of the Commonwealth of Puerto Rico through their undersigned attorneys and without submitting to the jurisdiction of this Honorable Court respectfully request the dismissal of the instant case on the grounds stated in the Memorandum of Law in support of this Motion to Dismiss which we are respectfully submitting attached herein.

Respectfully Submitted.

In San Juan, Puerto Rico, this 3rd day of July, 1978.

MIGUEL A. GIMENEZ MUNOZ
Secretary of Justice

CARLOS A. SHINE
Assistant Secretary of Justice

/s/ Francisco R. Agrait Llado
FRANCISCO R. AGRAIT LLADO
Attorney
Department of Justice

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil Number: 77-1011

CARLOS RIVERA GOMEZ, PLAINTIFF

v.

ASTOL CALERO TOLEDO, ET AL., DEFENDANTS

DECISION AND ORDER—October 23, 1978

Plaintiff, an agent for the Bureau of Criminal Investigations of the Police Department of the Commonwealth of Puerto Rico, has brought this action against the former Superintendent of the Department.[1] Jurisdiction is invoked pursuant to the provisions of 42 U.S.C. 1983 and its jurisdictional counterpart, 28 U.S.C. 1343.

We shall address ourselves to Defendants' request for dismissal. At the outset, we reject as utterly frivolous Defendants' contention that the Eleventh Amendment bars suit against Defendant Calero. *Scheuer* v. *Rhodes*, 416 U.S. 232, 238 (1974). However, dismissal of the Complaint is required on a different ground.

As a general rule, public officers are liable in their personal capacity when, acting under color of law, they deprive others of their federal civil rights. *Screws* v. *United States*, 325 U.S. 91 (1945). However, a qualified immunity has been granted to executive and administrative officials for acts done by them in good faith within the scope of their official duties. *Pierson* v. *Ray*, 386 U.S. 547, 555-557 (1967); *Cobb* v. *City of Malden*, 202 F. 2d 701, 707 (C.A. 1, 1953) (Magruder, C.J., concurring); see also, *O'Connor* v. *Donaldson*, 422 U.S. 563

[1] Also named as Defendants were the Commonwealth of Puerto Rico and the Police of the Commonwealth of Puerto Rico. As a matter of law, these parties are not amenable to suit, and Plaintiff so concedes. *Kostka* v. *Hogg*, 560 F.2d 37, 43 (C.A. 1, 1977); *Ursulich* v. *Puerto Rico National Guard*, 384 F. Supp. 736 (D.C.P.R., 1974).

(1975); *Wood* v. *Strickland*, 420 U.S. 308 (1975); *Scheuer* v. *Rhodes*, *supra*. In order to prevail in his monetary claims,[2] Plaintiff has the affirmative obligation to allege, and prove with particularity, that the defendants acted in bad faith, i.e., that their conduct was either purposefully discriminatory or reckless. *Gaffney* v. *Silk*, 488 F. 2d 1248, 1250-1251 (C.A. 1, 1973).

The Complaint filed in the instant case, even when read in the light most favorable to Plaintiff, completely fails to satisfy the requirement outlined above. From the Complaint's deficient allegations, no set of provable facts are apparent which would entitle Plaintiff to the relief claimed. *Scheuer* v. *Rhodes*, supra, at 236; see also *Stadium Films, Inc.* v. *Baillargeon*, 542 F. 2d 577 (C.A. 1, 1976); Alicea Rosado v. García Santiago, 562 F. 2d 114, 121 (C.A.1, 1977).

This case is hereby dismissed. Judgment shall be entered accordingly.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 23rd day of October, 1978.

/s/ Juan R. Torruella
JUAN R. TORRUELLA
U.S. District Court Judge

[2] Plaintiff was reinstated to his former position, with back pay, by the Investigation, Prosecution and Appeals Commission of the Police Department, and his prayer is limited to monetary damages by reason of the "stress, anxiety, embarrassment and impairment to his reputation" allegedly occasioned by the acts of Defendants. An award of punitive damages is also prayed for in the *ad damnum* clause of the Complaint.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil No. 77-1011

CARLOS RIVERA GOMEZ, PLAINTIFF

vs.

ASTOL CALERO TOLEDO ET AL., DEFENDANTS

JUDGMENT—October 24, 1978

The Court having entered a Decision and Order through Hon. Juan R. Torruella dismissing the complaint.

It is ORDERED AND ADJUDGED that the complaint be dismissed.

IT IS SO ORDERED.

San Juan, Puerto Rico, October 24, 1978.

/s/ Ramon A. Alfaro
RAMON A. ALFARO
Clerk of the Court

UNITED STATES COURT OF APPEALS
FIRST CIRCUIT

No. 78-1546

CARLOS RIVERA GOMEZ, APPELLANT

v.

ASTOL CALERO TOLEDO, ET AL., APPELLEES

Submitted June 8, 1979

Decided Aug. 7, 1979

Agent for Bureau of Criminal Investigations of Police Department of the Commonwealth of Puerto Rico sued the police force superintendent, alleging that his suspension and discharge violated his civil rights. The United States District Court for the District of Puerto Rico, Juan R. Torruella, J., dismissed and agent appealed. The Court of Appeals, Bownes, Circuit Judge, held that, because of the superintendent's qualified immunity, the failure to allege that he acted in bad faith in suspending and discharging the agent required dismissal of the suit.

Affirmed.

James A. Toro and Jose Luis Rodriguez Mangual, San Juan, P. R., on brief, for appellant.

Hector A. Colon Cruz, Sol. Gen., and Federico A. Cedo Alzamora, Asst. Sol. Gen., Dept. of Justice, San Juan, P. R., on brief, for appellees.

Before COFFIN, Chief Judge, CAMPBELL and BOWNES, Circuit Judges.

BOWNES, Circuit Judge.

The issue before us is whether the district court erred in dismissing this 42 U.S.C. § 1983 civil rights case for failure to state a cause of action.[1]

[1] Fed.R.Civ.P. 12(b)(6).

A brief statement of the facts leading up to the complaint is necessary. Plaintiff-appellant was, and is, an agent for the Bureau of Criminal Investigations of the Police Department of the Commonwealth of Puerto Rico. Because of accusations of improper conduct he made against two other agents of the Department, an investigation was ordered by defendant-appellee, Astol Calero Toledo, Superintendent of the Police Force of the Commonwealth. As a result of the investigation, plaintiff was transferred to the Police Academy at Gurabo, Puerto Rico, as an instructor with no investigative duties or authority.[2] Plaintiff subsequently testified in a criminal case on behalf of the defendant to the effect that false evidence was obtained and introduced by these two agents. His admission that he obtained this knowledge by tapping the telephone conversations of the agents resulted in criminal charges against him for violating the wiretapping statute of Puerto Rico. Plaintiff was first suspended and then discharged without a hearing by defendant. After an appeal to the Investigation, Prosecution and Appeals Commission, the discharge order was revoked and plaintiff was reinstated in his former position with full retroactive payment of salary.

The complaint originally named the Commonwealth of Puerto Rico and the Police of the Commonwealth of Puerto Rico as defendants in addition to Calero Toledo, but these defendants were dismissed with the consent of plaintiff. The complaint seeks damages because "plaintiff has suffered and continues to suffer stress, anxiety, embarrassment and impairment to his reputation." The district court held that because of defendant's qualified immunity as Chief of Police, plaintiff had to allege that he acted in bad faith in suspending and discharging plaintiff and that since the complaint failed to do so, even when read in the light most favorable to him, it was dismissed. No motion to amend the complaint was made.

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[2] Plaintiff alleges that as a result of the investigation, it was concluded that the charges were true, and it was recommended that the agents be discharged. Defendant claims that the inquiry found that the charges could not be substantiated.

Appellant raises three issues on appeal: that defendant was not, because of his position alone, automatically entitled to a qualified immunity; that the district court erred in finding that the complaint was deficient as a matter of law; and that the allegations in paragraph 18 of the complaint stating that the defendant failed to follow Police Department regulations as to disciplinary procedures amounted to an allegation of bad faith.

It has now been firmly established by a long line of cases that in a civil rights action for damages, public officials acting in their official capacity enjoy a qualified immunity that protects them if they acted with a good faith belief based upon reasonable grounds that their actions were necessary. Or to put it conversely, a plaintiff in such an action must prove that the public official acted in bad faith, meaning with malice or recklessness. *Butz* v. *Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed. 2d 895 (1978); *O'Connor* v. *Donaldson*, 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975); *Wood* v. *Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975); *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974); *Pierson* v. *Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967); *Tenney* v. *Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951).

Our cases reflect the accepted law that public officials enjoy a qualified immunity. *Maiorana* v. *MacDonald*, 596 F.2d 1072 (1st Cir. 1979); *Kostka* v. *Hogg*, 560 F.2d 37, 39 (1st Cir. 1977); *Gaffney* v. *Silk*, 488 F.2d 1248 (1st Cir. 1973). With the law now so clear on this point, it follows that a plaintiff must allege as well as prove that a public official acted in bad faith to state a valid cause of action.

> Thus, while a § 1983 action for money damages may be maintained against such officials, plaintiffs have the obligation to sufficiently *allege* and prove that defendant's conduct was either "purposefully discriminatory," *Harrison* v. *Brooks*, *supra*, 446 F.2d [404] at 407 [1st Cir. 1971] "knowing or reckless," *id.* or "willful," *Ka-Haar, Inc.* v. *Huck*, 345 F.Supp. 54 (E.D. Wis. 1972) (emphasis added).

Id. at 1250-51.

This is not the ritualistic incantation of "catchwords," as appellant argues, but a basic pleading requirement. Fed.R.Civ.P. 8(a)(2) requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." We have made it abundantly clear that in 1983 actions the complaint must be specific and factual as to the claims made. *Hurney* v. *Carver*, 602 F.2d 993, at 995 (1st Cir. 1979); *Ludwin* v. *City of Cambridge*, 592 F.2d 606, 610 (1st Cir. 1979); *Slotnick* v. *Staviskey*, 560 F.2d 31, 33 (1st Cir. 1977); *Kadar Corp.* v. *Milbury*, 549 F.2d 230, 233 (1st Cir. 1977); *O'Brien* v. *DiGrazia*, 544 F.2d 543 (1st Cir. 1976), *cert. denied*, 431 U.S. 914, 97 S.Ct. 2173, 53 L.Ed.2d 223 (1977). Where, as here, a public official is being sued for action taken in his official capacity, it is assumed that he wears a cloak of qualified immunity and the complaint must allege and specify facts that show bad faith or state why in this particular case the cloak was shed.

We, therefore, turn to an examination of the complaint bearing in mind that it must be read liberally and should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957). We first note that paragraph 2 of the complaint alleges that the defendant acted in his official capacity as Chief of Police of the Commonwealth. This immediately invoked the doctrine of qualified immunity. Nowhere in the lengthy recitation of facts is there any reference to bad faith, malice or recklessness or facts on which such an inference could reasonably be based. While the complaint does allege that plaintiff was suspended and discharged prior to a hearing, it also states (paragraph 16) that plaintiff followed the Department appeal process and succeeded in being reinstated and awarded all back pay. This raises some doubt as to the allegations of paragraph 17 that his discharge, prior to a hearing, was in violation of the Police Department's own regulations and that his constitutional right to due process of law was violated. There is no rigid rule that requires

a pretermination hearing before discharge in all cases. In many instances, the requirements of swift and effective governmental action precludes a hearing until after the discharge. *See Rodriguez de Quinonez* v. *Perez*, 596 F.2d 486 (1st Cir. 1979), and *Levesque* v. *State of Maine*, 587 F.2d 78 (1st Cir. 1978). We point this out not to express an opinion on the merits, but to show that the complaint does not set forth facts alleging such wrongdoing by defendant as to raise an inference of bad faith. *Diez Gonzalez* v. *Colon Gonzalez*, 536 F.2d 453, 456 & n.12 (1st Cir. 1976). We think it also significant that plaintiff here did not move to amend the complaint after it was dismissed. In *Gaffney* v. *Silk*, *supra*, 488 F.2d at 1251, we held that an amended complaint should have been allowed, even though it was filed after the original complaint had been dismissed for failure to allege enough to overcome the qualified immunity of public officials. We do not take lightly the dismissal of a complaint for failure to state a cause of action in a 1983 case, but must assume that when the plaintiff is represented by counsel, the complaint is drawn in the light of the applicable law and contains the pertinent facts. The failure of plaintiff to allege bad faith, malice or recklessness in so many words plus the lack of any facts on which to make such an inference is fatal.

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 79-5601

CARLOS RIVERA GOMEZ, PETITIONER

v.

ASTOL CALERO TOLEDO

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for a writ of certiorari be, and the same is hereby, granted.

January 14, 1980

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1979

No. 79-5601

CARLOS RIVERA GOMEZ

Petitioner

v.

ASTOL CALERO TOLEDO

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals object of the instant action was reported (602 F. 2d 1010 (1979)) and is set forth in Appendix-4 of the Petition for a Writ of Certiorari filed by the petitioner in this case before this Honorable Court, as are all the pertinent portions of the record before the Court of Appeals.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition for a Writ of Certiorari.

QUESTION PRESENTED

Whether the plaintiff in a civil rights action filed under 42 U.S.C. §1983 must allege bad faith on the part of the defendant in order to state a cause of action.

STATUTES INVOLVED

The Federal Statutes involved are: 42 U.S.C. sec. 1983, 28 U.S.C. sec. 1331 and sec. 1 of the Fourteenth Amendment to the Constitution of the United States of America. The pertinent provisions of those statutes are included in the petition.

STATEMENT OF THE CASE

This civil rights action for damages was filed at the United States District Court for the District of Puerto Rico by Carlos Rivera Gómez, formerly and still currently an agent with the Police Department of the Commonwealth of Puerto Rico, against Astol Calero Toledo, Superintendent of the same, seeking monetary compensation for supposed damages and injuries said to be caused by an alleged deprivation of some of his constitutional rights when he was temporarily discharged from the police force on July 14, 1976.

In April 1975, the petitioner, not acting within his official duties, and on account of knowledge admittedly obtained by unauthorizedly tapping private telephone conversations with other police agents made serious imputations regarding two other agents of the Bureau of Criminal Investigations of the Police Department, concerning what he considered as false evidence supposedly obtained and offered as evidence admissible in Law by those two fellow agents in a criminal case under their investigation.

An official inquiry was conducted as a result of the petitioner's imputations, but since it failed to substantiate them, it was recommended that petitioner not be returned to his former duties in the city of Ponce, that he be reprimanded in writing and that he be instructed to abstain from involving himself on his own whim in investigations officially assigned to other agents. Accordingly, the petitioner was transferred to the Police Headquarters in San Juan and later, as an instructor, to the Police Academy.

During the term of petitioner's duties as an instructor in the Police Academy, he testified for the defendant in a criminal case against one of the most sought after criminals in the island, declaring that the case had been "fabricated" by two investigative agents but, notwithstanding petitioner's testimony as to the alleged "fabrication," on March 27, 1976 the jury found the defendant guilty of first degree murder.

Then, as a result of plaintiff's having admitted in court that he had, on his own, tapped private telephone conversations of the agents allegedly involved in the above mentioned "fabrication", the judge presiding the criminal case ordered that the tapes be produced, and subsequently, criminal charges were brought against petitioner for violation of article 149 of the Puerto Rico Penal Code,[1/] pursuant to a report and recommendation of Assistant Prosecuting Attorney Jorge Roberto Feliciano, on May 20, 1976.

By letter of May 26, 1976, defendant Astol Calero Toledo, then Superintendent of the Police of the Commonwealth of Puerto Rico, acting in his official capacity, by virtue of authority vested on him under Law No. 77 of June 22, 1956, as amended, (25 L.P.R.A., secs. 221-221t), and regulations issued thereunder, and in due compliance with Sec. 14(E) of Act 26 of August 22, 1974 (25 L.P.R.A., sec. 1014(e), Cumulative Pocket Supplement of 1976), suspended petitioner temporarily from employment with the Police Department while he was being investigated on account of the aforementioned criminal charges.

1/ 33 LPRA 4190 (1978 Cumulative Pocket Supplement) which reads:

> "Every person who for his own or another's benefit, or to injure another, utilizes, negotiates, speculates, employs or otherwise makes use of a personal private message which has been unlawfully intercepted, violated, or recorded or who in any way induces or attempts to induce any agent, officer or employee of a telephone or telegraph company to disclose the contents of any private communication shall be punishable by imprisonment not exceeding three years or a fine not exceeding five thousand dollars or both in the discretion of the Court."

On July 14, 1976, petitioner was duly discharged from employment for violating Rules 3 and 26, Chapter 7, Sec. 1, Regulations of the Police of Puerto Rico by contesting unwarrantedly the honesty, integrity and competence of two member of the corps, making improper manifestations denigrating their dignity, and observing an injurious or disorderly conduct, thus harming the Police Department. Said discharge was in accordance with the applicable provisions of Commonwealth Law, which provides for appeal before the Investigation, Prosecution and Appeal Commission (CIPA) and petitioner was duly informed of his right to appeal from that order.

Petitioner appealed from his discharge by respondent Astol Calero Toledo's letter of July 14, 1976, before the Investigation, Prosecution and Appeals Commission, (CIPA), which after a hearing, and by ruling of December 1, 1976, revoked Astol Calero Toledo's administrative order discharging petitioner from employment and ordering his reinstatement to his former position, with salaries accrued.

Claiming that as a result of that shortlived[2/] discharge from his former employment he had suffered stress, anxiety, embarassment and impairment to his reputation, the petitioner, on July 14, 1977 sued the respondent for compensatory, punitive and exemplary damages before the United States District Court for the District of Puerto Rico.

The District Court dismissed the case on October 23, 1978, since from the complaint's deficient allegations, no set of probable facts were apparent which would entitle the plaintiff, here petitioner, to the relief claimed, because it had not even been alleged that the Superintendent of Police had acted in bad faith or that his conduct in

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2/ Three and a half months.

suspending and discharging the agent had been purposefully discriminatory or reckless.

Petitioner appealed before the United States Court of Appeals for the First Circuit, which on August 7, 1979 affirmed that decision, considering that since public officials acting in their official capacity enjoy qualified immunity from liability for damages if they have acted in good faith, the failure of plaintiff (here the petitioner) to allege bad faith, malice or even recklessness, plus the lack of any facts on which to make such an inference, the Superintendent (here the respondent) could not be held liable for damages, noting also as significant, the fact that plaintiff (here the petitioner) did not move to amend the complaint in the light of the applicable law after it was dismissed by the District Court.

ARGUMENT

Petitioner holds simply that in order for him to state a valid cause of action in a civil rights case against a public official filed under 42 U.S.C. sec. 1983, he did not even need to allege bad faith on the part of the Respondent, just because in many other circuits cases such pleading has not been required and because this Honorable Court has held the opposite.

Respondent holds that such contentions are not true and that in order to state a valid cause of action, petitioner's complaint should have at least included allegations of facts which, if proven, would have entitled him to the relief claimed, and also, that since respondent acted in good faith and in his official capacity in discharging petitioner from his job, he enjoied qualified immunity from liability for damages, concerning which, petitioner failed even to allege bad faith, malice or recklessness in the discharge of his duties or to evoke any facts on which such a tendencious inference could be made.

A certiorari should be denied, since only temerity or a less than diligent pursuit of petitioner's own interests left it available as a last recourse, which otherwise would have been unnecessary had the petitioner just moved to amend the complaint (dismissed for failure to allege enough) in the light of the applicable law when faced merely with the need to comply with a basic pleading requirement. Also because the decision of the Court of Appeals is not in conflict with the applicable decisions of this Honorable Court, is not in direct conflict, due to differences in the concurring facts with decisions of other courts of appeals on matters of federal law, it does not pose an irreconcilable conflict in the application of rules of law and only represents a correct exercise of independent judgment which, after all, might also stand on other grounds.

At the Court of Appeals, the defendant, (here respondent) contended that the requirements of Gaffney v. Silk, 488 F 2d 1243, (1 Cir. 1973), mandated the dismissal of the complaint, not merely because a qualified immunity had been invoked by defendant Astol Calero, within whose context the insufficiency of the allegations of the complaint could be determined, but also because the element of good faith in Astol Caleros' actions, though not questioned in the complaint, had definitely been considered by the District Court, since in the answer to the complaint the defendant stated, as an affirmative defense, that "at all times pertinent to the complaint the Superintendent of Police had acted in compliance with the applicable provisions of Law and in the good faith performance of his official duties as an executive officer of the Commonwealth of Puerto Rico", and since, as stated in the Decision and Order, the Complaint, even when read in the light most favorable to plaintiff, completely failed not only to "prove with particularity", but even to allege that this defendant had acted in bad faith or that his conduct had been purposefully discriminatory and reckless.

As it is therefore plainly evident, the District Court did not lightly presume, neither simply took for granted, the fact that respondent had acted in good faith. His qualified immunity was not born from an automatic assumption supposedly applied to a type of situation, but from the affirmed and uncontested essential fairness, and correctness of his performance while discharging his official duties.

Petitioner has alleged that a clear violation of statutory due process coupled with some allegations in the original complaint was sufficient to negate defendant's qualified immunity, but the truth is that there never was such a violation of due process (Allegedly consisting in the absence of a hearing prior to his discharge), since Act 20 of August 22, 1974 does not grant the celebration of such a hearing and neither do the Puerto Rico Police Regulations of 1968, while it could hardly be feasible to describe the Superintendents' official actions justly as "discriminatory persecution and wrong doing" since he limited himself to the most uniform enforcement of all Laws and Regulations applicable. So there could be no evidence of bad faith per se in such a normal discharge of respondent's official duties.

Finally, the fact that, upon appeal, the C.I.P.A. revoked the Superintendent of Police, serves as proof that the plaintiff was afforded, to a full extent, the benefits of a due process that unquestionably favored him.

An exemplary decision as such could only be construed, at most, to imply that the Superintendent had incurred in an administrative error for which the plaintiff has been already adequately compensated by being reinstated to his former position with salaries accrued. Therefore, absent the necessary original allegations to establish bad faith and to contradict later its affirmation, the complaint was indeed insufficient to assert and sustain a civil right claim for damages against the respondent.

In the instant case we understand that many of the allegations in the Complaint, as to Superintendent Calero, were highly conclusory and as such not sustained at all by law. (Please Refer to Paragraphs 10, 11, 12, 14 of the instant original Complaint, Appendix to Petition, pp. 9-10). Other allegations in the Complaint as to the Superintendent, were really only stating that the Superintendent acted in accordance with Act 26, 1974 which created the Law of the Police, and the Puerto Rico Police Regulation of 1968, which were the two statutes and Rules then in force which provided for the Police and the Superintendent to act and abide themselves by. (Please refer to paragraphs 1, 6, 12, 13 of the same Complaint, Appendix to Petition, pp. 8-10).

Nowhere in the complaint was defendant Calero charged specifically or even implicitly with having acted in bad faith or that his conduct was reckless or purposefully discriminatory, while on the contrary, he asserted not only that he had acted in good faith in the performance of his official duties but also explained positively how the applicable provisions of law had been dutifully complied with.

So, his qualified immunity, far from been automatically accorded, was granted taking in consideration the scope of his official duties as stated in the above cited Laws and Regulations. Petitioner failed totally even to allege that the Superintendent of Police had acted otherwise.

A review on writ of certiorari is a matter of sound judicial discretion which can neither be controlled nor fully measured even by the very Rules of this Honorable Court.

It is evident that the instant case lacks the special and important reasons and questions or issues of substance and wide impact to merit the exercise of such discretionary jurisdiction.

I- Implausibility of conflict between appellate courts decisions.

Petitioner states that the Decision of the Court of Appeals below created a conflict in the Decisions of the Circuit Courts of Appeals such as to merit the exercise of jurisdiction by this Honorable Court. That is not so.

The existence of a vital conflict between the decision as to which review is sought and that rendered by an another court of equal rank, is a well established ground for granting certiorari. However, in the instant case we shall see that the alleged conflict supposedly giving rise to the petition is not a true one, and that it does not in fact even exist as such.

There might be some differences in principle, but not a real conflict in the actual application of rules of law.

Petitioner brings himself to admit that besides the First Circuit, there is also support in the Fifth Circuit "for the position that plaintiffs have the burden of negating qualified immunity". Respectfully we deem that in all circuits, plaintiffs would gladly forward their cause by contradicting or negating any claim of qualified immunity once it has been put forward and fundamented by a defendant as it was in the instant case.

The fact that some circuits may have established different pleading requirements can be more properly considered as a correct exercise of independent judgment concerning only allegations, that can not be construed as placing the burden of proving anything on anyone but the most concerned part.

Nevertheless, in Cruz v. Beto, 603 F. 2d 1178 (5th. Cir. 1979), quoted by the Petitioner, the court went as far as to state that under some circumstances, the plaintiff had the burden of piercing qualified immunity by pleading and proving an abuse of authority or bad faith once such immunity had been established by the defendant by virtue of asserting that his questioned decisions were made in his official capacity, based on what he perceived to be a security need of the institution of which he was Director. In the instant case, the Superintendent

of Police did exactky the same, asserting that he had acted in his official capacity based on all laws, Rules and Regulations applicable, which he proceeded then to cite and explain). The court agreed that the plaintiffs had to carry that burden, since to deny the defendant qualified immunity protection unless he demostrates that his actions were above the benchwork of legal good faith, would make the concept of qualified immunity "a meaningless embellishment."

It must be born in mind that in the instant case, the respondent gladly took upon himself the burden of stating and explaining his good faith even when the plaintiff had failed not only to mention it with that many words, but even to imply any bad faith on his part concerning his discharge.

A plaintiff may have a cause of action under 42 USC Sec. 1983 and 28 USC 1343 only if he can sustain that his rights under the laws of Constitution of the United States have been violated by a person acting under color of law. In the present case, the only Constitutional right that plaintiff alleged was violated, was his statutory due process, which he alleged is granted to him under Act 26 (supra), but we respectfully believe that it should be clear by now that petitioner was dealt with, administratively, in accordance to the method the said Law provides for the imposition of disciplinary measures. (Please see: Curtiss v. Peerless Ins. Co., 299 F. Supp. 429 (D.C. Minn. 1969); Krum v. Sheppard, 255 F. Supp. 944 (D.C. Mich., 1966); United States v. Biloxi Municipal School District, 219 F. Supp. 691 (S.D. Miss. 1963); affd. 326 F 2d 237 (CA 5, 1964), cert. denied 397 US 929 (1964); Javits v. Stevens, 382 F. Supp. 135 (DCSDNY 1974). Also see: Heller v. Roberts, 386 F. 2d 382 (CA 2, 1967); Hopkins v. Wasson, 227 F. Supp. 279 (DCED Tenn. 1964 affd. 329 F. 2d 87, (CA 6, 1964) cert. denied 379 U.S. 854 (1964).

As to the statutory due process supposedly vitiated by Respondent Calero's act, paragraph 17 of the Complaint reads as follows:

> "17. That plaintiff's discharge without prior hearing was an act in violation of Law No. 26, of August 22, 1974 which law requires the celebration of administrative hearing prior to imposing disciplinary measure against members of the force and/or of his constitutional rights to a procedural due process of law and further violated plaintiff's right not to be arbitrarily discharged from public employment."

The respondent submitted that this particular allegation was not sustained anywhere or in anyway by law. The contents of Act 26, 1974 (supra) does not grant the celebration of an administrative hearing prior to the imposition of disciplinary measures against members of the Police Force. Act 26 (supra) at its pertinent part provides for the method to follow when imposing disciplinary measures and divides it in two, one for light shortcomings and one for serious shortcomings. (Please refer to Section 12, 13 and 14 of Act 26, supra). In no part of these sections of Act 26, supra, aforecited can it be found the administrative hearing that plaintiff affirms to exist, or his entitlement to it. There is only one reference to an opportunity for a defendant in those proceedings "to be heard" (not a formal hearing) and that is in Section 14, part (b) which reads as follows: "The Superintendent, after examining and analyzing the record, and after giving the defendant an opportunity to be heard, shall decide the case either by acquitting the defendant or by imposing the punishment he deems advisable as provided in subdivision (d) of this section." (Emphasis supplied).

We respectfully believe that in no way the aforementioned section could be misconstrued to signify that Law 26 (supra) requires "the celebration of an administrative hearing prior to imposing disciplinary measures against members of the force", and petitioner has not even alleged that he was denied the above cited opportunity.

Besides all the contentions stated above, we respectfully understand that petitioner was duly granted his statutory due process, a fact confirmed by the Ruling of the Investigation, Prosecution and Appeal Commission of December 1, 1976, reversing the Superintendent's decision of July 14, 1976 (discharging plaintiff from his job) "and ordering his reinstatement to his former position with salaries acfrued." (Please Refer To: Paragraph 16 of the Complaint in which plaintiff himself recognizes this situation).

Act No. 26 of August 22, 1974 did not require the celebration of an administrative hearing prior to the imposition of disciplinary measures upon members of the police force and thus the dismissal of plaintiff without a pre-termination hearing could not ever be construed as violative of his rights to due process, and much less that defendant Calero's participation in that decision could amount, even by a long strecht of imagination, to a demostration of bad faith, reckless or even purposefully discriminatory conduct.

The applicability of decisions in other cases invoked by petitioner does not bear closer scrutiny when it is considered that most of them did not deal with how the burden of proof falls when the immunity issue is raised.

In Skelman v. Board of Trustees of Bloomsbring State College, 550 F. 2d 53 (3d Cir. in banc, 1976), Cert. den. 429 US 979 (1976), cited by Petitioner as "the most directly in conflict with the decision below", the court, considering questions of burden of proof, held that the burden is on the defendant official claiming official immunity to come forward and to convince the trier of fact that official immunity should attach.

Is it not just that what respondent did in the instant case when he came forward in his Answer to the Complaint, stating as an affirmative defense and explaining how at all times he had acted in compliance with the applicable provision of Law and in the good faith performance of his official duties?

Is there any real conflict between the aforementioned case and the decision below just because here the trier of facts, after considering the pertinent dispositions of all laws and regulations invoked, was convinced that official immunity should attach? Of course not, and the same applies to other two of the cases cited by petitioner, like Safeguard Mutual Insurance Co. v. Miller, 472 F. 2d 732 (3d Cir. 1973) and Thompson v. Burke, 556 F. 2d 231, (3d Cir. 1977).

In Bivene v. Six Unknown Named Agents, 456 F 2d 1339 (2d Cir. 1972), also cited by petitioner as "probably the leading case on the good faith defense in 1983 actions among lower federal court decisions", the court merely held that public officials have no absolute immunity from suits for constitutional deprivations (something that no one ever claimed in the instant case) and that it is a defense to allege and prove good faith (an affirmative defense which was brought before the court by respondent in the instant case).

May we respectfully ask: Where is the real conflict? There is none, and of course if there were any it would not be irreconcilable at all. The same applies to Laverne v. Corning, 522 F. 2d 1144 (2d Cir. 1915), also cited by the petitioner.

In McCray v. Burrell, 516 F. 2d 357 (4th. Cir., in banc), 1975, cited by the petitioner, it was held that qualified immunity was a matter of defense. In the instant case, it was in effect brought up by the defendant, here respondent, as an

affirmative defense.

In Bryan v. Jones, 530 F 2d 1210 (5th. Cir., in banc) 1976 Cert. den. 429 U.S. 865 (1976), it was held that good faith is a defense (one that was alleged by respondent in the instant case) and that a plaintiff need not prove its absence to make out a prima facie case. In the instant case the petitioner failed first not only to prove, but even to allege such absence and later to contradict the presence of good faith once it had been invoked, claimed and explained by respondent.

Is there any similarity at all? Certainly petitioner must concede that there is a difference between not needing to prove anything beforehand, and failing later to contradict something that has been already claimed and explained to the subsequently evident satisfaction of a court.

In Rainer v. Short, 573 F. 2d 621 (5th Cir. 1978) 99 S. C. 1425 (1979), the Court of Appeals approved a jury instruction placing the burden of proving the good faith defense on the defendants.

Respectfully we deem that there is no real conflict between a decision that merely requires plaintiffs to allege something, and another one that places on defendants the burden of contradicting later such allegation by proving that the contrary was true. In fact it could be said that both complement each other.

In Glasson v. City of Louisville, 518 F. 2d 899, 907-910 (6th Cir. 1975) Cert. den. 423 U.S. 930 (1975) and in Jones v. Penegan, 459 F. 2d 31 (6th. Cir. 1972), cited by the petitioner, the courts characterized qualified immunity as an affirmative defense, which was just and exactly the way respondent qualified it in his answer to the complaint.

In Tritsis v. Backer, 501 F 2d 1021 (7th Cir. 1974), Brubaker v. King, 505 F. 2d 534 (7th Cir. 1974). Boscarino v. Nelson, 518 F. 2d 879 (7th. Cir. 1975), also cited by the petitioner, qualified immunity is treated as a defense, something that poses no real conflict with the decision below in the instant case, which besides treating the aforementioned immunity likewise, merely sets the allegation of absence of an element to which it is conditioned (good faith) as a pleading requirement.

In Landrum v. Moats, 576, F. 2d 1320 (9th. Cir. 1978), Cert. den. 439 U.S. 912, cited by the petitioner, it was held that like in case of any other affirmative defense, the burden of proving good faith (as an element of the defense, to the jury's satisfaction) was on the defendant. In the instant case, such burden was spontaneously born also by the defendant and if as stated there, the validity of the defense is "ordinarily" a question for the jury, in the instant case, since the affirmative defense rested on the strict compliance with all applicable rules and regulations, we respectfuly deem that such question was really for the judge.

In Gilker v. Baker, 576 F. 2d 245 (9th. Cir. 1978), it was held that the plaintiff need only make out a prima facie case of a constitutional violation, and then the burden shifts to the defendant. In the instant case, good faith was brought forward by respondent as an affirmative defense, even when petitioner had not really made out a prima facie case of a constitutional violation.

The actions of the Superintendent of Police herein involved were in strict compliance with the applicable provisions of law, within the bounds of his official authority, and far from being a "blatant disregard of his agency's procedural requirements, they constituted a valid and lawful discharge of his official duties which, particularly after a speedy and adequate administrative remedy rendered plaintiff whole, could not and should not be utilized as the basis for a civil rights claim.

In Donovan v. Reinhold, 433 F 2d 738 (10th Cir. 1970), it was held only that good faith would be a defense, something that we do not dispute since that does not preclude the fact that it could also be a pleading requirement.

In Martin v. Duffe, 463 F 2d 464 (10th Cir. 1972), it was held that good faith most be put forward as a defense, something that was done in the instant case.

In Dellums v. Powell, 566 (F. 2d 167 (D.C. Cir. 1977), Cert. den. 436 U. S. 915 (1978) reh. den. 439 U. S. 886 (1978), Apton v. Wilson, 500 F 2d 33 (D.C. Cir. 1974) and Zweibon v. Mitchell, 516 F. 2d 594 (1975), Cert. den. 425 US 944 (1976), it was also held that the burden of proving qualified immunity is on the defendants.

None of the above cases cited by petitioner pose an unsolvable conflict with the instant decision below due to the particular factors concurring here, where not only the petitioner failed to allege anything which would entitle him to the relief claimed, but also, significantly, where the respondent successfully put forward an affirmative defense of good faith based on strict compliance with all applicable laws, rules and regulations which explained and justified his behavior by themselves.

Besides, since the decision below could have been based on such an alternative ground, the fact that such decision might conflict with that of another appellate court on an issue does not constitute an adequate reason for the grant of certiorari.

As this Honorable Court stated in The Monaco v. Carbon Black Inc., 359 US 180 (at 184): "While this court decides questions of public importance, it decides them in the context of meaningful litigation'. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial, Resolution here of the .../Issue in conflict among the circuits/ can await a day when the issue is posed less abstractly."

II- Implausibility of Conflict with Decisions of the Supreme Court.

This happens not to be such a case where a decision of the Court of Appeals clearly fails to apply Supreme Court decisions neither deliberately or because of error or oversight.

There is not any direct conflict between the decision of which review is being sought by petitioner and any decision of this Honorable Court.

In Monroe v. Pape, 365 U.S. 167 (1961), cited by petitioner, it was held only that a civil right plaintiff did not have to allege a willful violation of constitutional rights or a specific intent to violate constitutional rights.

The instant case was dismissed mainly because from the complaint's deficient allegations, no set of probable facts were apparent which would entitle plaintiff to the relief claimed, and not because plaintiff might have merely failed to allege a specific intent to violate or a wilfull violation of his rights. Here, petitioner not only failed to allege bad faith and to prove with particularity any wilfull violation of his rights, but, more significantly, he failed even to state with particularity any prima fascie violation at all to his constitutional rights be it wilfull or not, while at the same time, respondent spontaneously raised the issue of immunity putting it forward as a defense.

It should be noted here, that dismissal of plaintiff was effected only after completion of an administrative investigation, in which plaintiff had the opportunity to be heard, and as a result of the recommendations made to the Superintendent of Police pursuant to said investigation.

Those who conducted the aforementioned administrative investigation and/or formulated the pertinent recommendations thereof are not parties to the present action (although they should be, since they are indispensable, pursuant to the

Federal Rules of Civil Procedure) but nevertheless, the reinstatement of plaintiff to his former position with back pay accrued, effected by the Investigation, Prosecution and Appeals Commission (C.I.P.A.) upon his appeal in accordance with the applicable provisions of law, as admitted in the complaint itself, far from constituting evidence of bad faith or purposeful discrimination on the part or the Superintendent, established beyond doubt that plaintiff was afforded due process of law and that his rights to "liberty" and "property" had been adequately protected.

In Pierson v. Ray, 386 U.S. 547 (1967), this Honorable Court held that defendants would have available to them the defense of good faith, which was put forward by respondent in the instant case, and while it noted that a complaint should not be dismissed for failure to state that the officers had a specific intent to deprive a person of a federal right, it can not be presumed that the instant case, was dismissed only on those grounds, since the court also had the benefit of considering the reasonableness and validity of the affirmative defenses put forward by the respondent.

Respectfully we deem that it can not be said that the court below held that the plaintiff must negate in his complaint the existence of the defendants' qualified immunity when it was just held there that he had only to allege that the defendant had acted in bad faith, leaving upon the defendant the burden of proving that in effect, he had access to a qualified immunity since he had acted only in good faith within the scope of his official duties.

In Scheuer v. Rhodes, 416 U.S. 232 (1974), this Honorable Court held that there is no automatic assumption that defendant public officials have acted in good faith, and that such good faith can not be taken for granted.

The decision of the Court of Appeals below does not contradict at all this language of Scheuer v. Rhodes, since at the District Court, whose decision was affirmed by it, such "assumption" far from being automatically applied, and since such good faith, far from being taken for granted, were given their due credit only after the court could ponder on the validity of the affirmative defenses put forward by the respondent.

In Wood v. Strickland, 420 U.S. 308 (1975), this Honorable Court held that where the applicable constitutional principles were settled, a plaintiff need not show malice on the part of a defendant, in order to prove a claim. This poses no conflict with the decisions in the instant case, where the applicable constitutional principles were not settled at all, and where it was obviously deemed that the complaint was not specific and factual as to the claims made, failing to comply with a basic pleading requirement: stating that the pleader was entitled to relief, not by actually showing malice but by at least merely alleging that the respondent had acted in bad faith.

Petitioner cites Butz v. Economou, 438 US 478 (1978), but that case, besides contributing a deep historical analysis of the immunity defense, does little if anything at all to bolster his contentions, while on the contrary, as we see in Procunier v. Navarette, 434 U.S. 555 (1978), this Honorable Court conclusively affirmed the granting of a summary judgment in a case where the defendants had raised the defense by motions supported by affidavits. This has a direct hearing on the instant case, where the defendant raised the same defense in his answer to the complaint (Nov. 10, 1967) and on his motion to dismiss (July 3, 1978), supported nonetheless by direct citations of the laws, rules and regulations applicable which stood by themselves.

SUMMARY

The decision of the Court of Appeals below is not in any real or direct conflict with pertinent decisions rendered by other Courts of Appeals, which in most cases actually complement it as well each other, some by emphasizing the importance of compliance with a basic pleading requirement, some by defining the contours or scope of qualified immunity for public officials in cases such as the instant one, and others by recognizing distinctions as to the burden of proof, depending on the amount of discretion exercised by the defendant. It is neither in conflict with any decision rendered by this Honorable Court, who as a matter of fact, has not yet squarely declared how the burden of proof falls when the immunity issue is raised, since it was precisely based on such decisions as those in Scheuer v. Rhodes, 416 U.S. 232 (1974), Pierson v. Ray, 388 US 547 (1967) and Wood v. Strickland, 420 US 308 (1975).

Besides lacking the special and important questions of substance to merit the exercise of its discretionary jurisdiction, certiorari should be denied by this Honorable Court since it was deliberately left by the petitioner as a last recourse which otherwise would have been unnecessary had him innitially complied with pleading requirements of which full knowledge can be presumed on his part, or had him simply moved to amend the complaint (dismissed just for failure to allege enough once he had been given notice of the fatal consequences of such incompliancy, and also, because after the respondent put forward his affirmative defenses, the decision of the court below might have been issued as well in view of self evident assertions such as that his decision was made as Superintendent of Police, consonant with what was provided in all applicable laws, rules and regulations, besides considering what he, acting upon recommendation arising from an official inquiry had perceived then to be more convenient to the spirit and reputation of the Police Department which had been harmed by the irregular and unorthodox activities of petitioner

(who after tapping private telephone conversations had made improper manifestations denigrating the dignity, honesty, integrity and competence of two fellow officers, observing an injurious or disorderly conduct, thus harming the Police Department).

In the absence of any clear violation of statutory due process and lacking the necessary allegations of factual circumstances to support the equally absent imputations of bad faith, the allegations of the complaint could only be deemed as insufficient to assert a civil rights claim against the Superintendent of Police for, at best, all that could be established thereof, through a complaint that chose to ignore a basic pleading requirement, is that the Superintendent had incurred in an administrative error while discharging the plaintiff, a situation to which, shortly after, adequate remedy was granted when petitioner was reinstated to his former position, with salaries accrued, by the Investigation, Prosecution and Appeals Commission of the Police Department.

The decision of the Court of Appeals did not affirm a decision where an assumption of qualified immunity had been automatically applied, thought it might seem so, since, thought it went unsaid, the concurrence of such a sine qua non factor as good faith was given its due credit only after the District Court could ponder on the validity of the affirmative defenses put forward by the respondent, which rested simply on his full compliance with the applicable dispositions of law.

Thus, the Court of Appeals did not err, when it concluded that the failure of plaintiff to allege bad faith plus the lack of any facts on which to make such an inference was fatal, mainly in view of the fact that respondent had raised effectively the issue of qualified immunity.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

San Juan, Puerto Rico, this 4th day of December, 1979

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Supreme Court, U. S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5601

CARLOS RIVERA GOMEZ, *Petitioner*,

v.

ASTOL CALERO TOLEDO, *Respondent*.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5601

CARLOS RIVERA GOMEZ, *Petitioner,*

v.

ASTOL CALERO TOLEDO, *Respondent.*

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The unreported opinion and judgment of the United States District Court for the District of Puerto Rico, dated October 23, 1978, dismissing petitioner's complaint against the respondent Astol Calero Toledo, are set forth at page 14 of the Appendix. The opinion of the United States Court of Appeals for the First Circuit affirming the dismissal is reported at 602 F. 2d 1018 and is set forth at Page 17 of the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on August 7, 1979, and a petition for certiorari was filed within 90 days of that date. The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISIONS AND OTHER AUTHORITIES

I. United States Constitution, Amendment 1:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

II. United States Constitution, Amendment 14, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

III. 42 U.S.C. §1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the person injured in an action at law, suit in equity, or other proper proceedings for redress.

IV. Federal Rules of Civil Procedure, Rule 8(c):

Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and

satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

V. Puerto Rico Police Act of 1974, Act No. 26 of 1974, 25 L.P.R.A. §1007

Regulations

The Superintendent is empowered to determine by regulations the organization and administration of the Police, the duties, responsibilities and behavior of its members and any other matter necessary for the functioning of the Corps. The regulations shall be submitted to the Governor and once he approves them, they shall have the force of law and take effect sixty (60) days after approval. The Superintendent shall be authorized to introduce amendments to the regulations following the same standards and procedure previously established for the approval thereof.

Until such time as the regulations provided herein take effect, the Police shall be governed by the Regulations in force under the provisions of Act No. 77 of June 22, 1956, except as to such provisions that are incompatible with this chapter.

The Superintendent shall determine in the Regulations the rank or position of the heads of divisions, zones, districts and precincts.

The Superintendent shall provide by Regulations the order to succession in the case of absence or disability, death or temporary vacancy—Aug 22, 1974, No. 26, Part 2, p. 671 §7, eff. 90 days after August 22, 1974.

VI. Puerto Rico Police Act of 1974, Act No. 26 of 1974, 25 L.P.R.A. §1014

Procedure for serious shortcomings

(a) The investigation record of every serious charge shall include a complete report of the imputations made against the respondent member or members of the Force. The investigation procedure and remittance of the record shall be made without unnecessary delay. The Regulations shall determine the officers who shall take part in the investigation record.

(b) The Superintendent, after examining and analyzing the record, and after giving the defendant an opportunity to be heard, shall decide the case either by acquitting the defendant or by imposing the punishment he deems advisable as provided in subdivision (d) of this section. If the member or members of the Force are found guilty, the Superintendent shall deliver a copy of the document to the defendant, containing his decision, which shall be evidenced by his signature and by indicating the date and time of notice as proof thereof. The procedure to be followed in these cases shall be determined by regulation.

(c) The charges for serious shortcomings shall be preferred in writing and signed by the Superintendent.

(d) The penalty to be imposed for serious shortcomings shall be one of the following: permanent expulsion from the Force, demotion or suspension from the Force, without pay, for a period of not more than five (5) months.

(e) The Superintendent shall be authorized to suspend temporarily from work and pay any Force member while an investigation is being carried out for incompetence, misconduct or crime of which said member of the Force is accused. In such case, the Superintendent shall see that the corresponding charges be preferred without undue delay. He shall investigate and decide such cases within the shortest possible time, imposing whatever punishment he deems reasonable within the limits thereof or providing that his reinstatement in the service with or without back pay during the suspension period, if in his judgment the facts so justify it.

(f) When a member of the Force is suspended from work and pay, for any reason, he shall be unable to exercise his functions as such. Nor shall he enjoy the rights and privileges which by law are granted to the members of the Police while such suspension lasts.

(g) In all such cases where penalties are imposed which entail the suspension of employment and salary, the Superintendent, at defendant's request, may condone said penalty by additional services to the Corps equivalent to the time the suspension lasts.

(h) Every Police member against whom an adverse decision is rendered by the Superintendent, may appeal before the Investigation, Prosecution and Appeal Committee created under sections 171-185 of Title 1, before which he may have a hearing pursuant to the terms of said section. The appeal shall be filed within 15 days after receiving notice of the punishment—Aug. 22, 1974, No. 26., Part 2, p. 671, §14, eff. 90 days after Aug. 22, 1974.

VII. Regulations Of The Puerto Rico Police
Approved April 21, 1976
Article XI Procedure In Dealing With Faults

Section 1: Procedure for Serious Faults

(a) Any member of the Police who, in the judgment of the Superintendent, commits a serious fault will be permanently expelled, degraded or suspended from the Force without pay, for a period of no more than five (5) months.

(b) The Superintendent will have the authority to temporarily suspend from employment and salary any member of the Force during any investigation that is ordered concerning incompetency, improper conduct or a crime of which a member of the Force is accused. In such a case the Superintendent will make sure that the corresponding charges are made without any unnecessary delay. He will investigate and resolve such cases in the shortest time possible, imposing the punishment that he esteems reasonable within the limits of his authority. The Superintendent may allow such a member to continue his duties with or without his salary, if in his judgment, the case so merits it.

(c) The investigation file of every serious charge will include a complete report of the accusations made against the accused member or members of the Force. The investigation process and remittance of the file will be done without unnecessary delay. At the start of any administrative investigation, the Investigator will inform the accused of the accusation made, of the right to testify or not, that if he testifies it may be used against him, of his right to legal assistance and that he may request from the Investigator a list of witnesses whom he may wish to be heard in his favor.

(d) The Superintendent will designate a permanent examinator to offer the accused the opportunity of be-

ing heard by presenting defense witnesses or confronting the accusers before final action is taken by the Head of the Department. It is understood that the fees incurred in presenting defense witnesses will be paid by the accused. The accused can refuse to appear, if he wishes, doing so in writing and with adequate legal advice giving the accused the opportunity of expressing his points of view in the matter concerned or even appearing with legal representation for a greater guarantee of his rights.

(e) The Superintendent, after examining and analizing (sic) the file and after assuring himself that the accused had the opportunity to be heard, will resolve the case, absolving the accused or imposing the punishment that he may deem reasonable. If the member of members of the Force involved are declared culpable, the Superintendent will send the accused a copy of his decision which will show the Superintendent's signature and indicate the date and hour of notification.

(f) When a member of the Force is suspended from employment and salary for whatever reason, he will not be allowed to perform his duties as such, neither will he be entitled to the rights and privileges which by law are given the members of the Force as long as his suspension lasts . . .

(i) Every resolution of the Superintendent permanently expelling, degrading or suspending from employment and salary for a period of no more than five (5) months any member of the Force, will be made in writing, notifying the member or members affected of the resolution as indicated below. The determination should contain the reasons on which the Superintendent bases his decision. The notification of the determination will always be made personally, when possible, by the Commanding Officer of the District where the accused lives or by his representative. . .

(k) Any such party affected by the determination of the Superintendent may appeal to the Investigating Processing and Appeal Commission within a period of fifteen (15) days from the date of the notification of the determination.

QUESTION PRESENTED FOR REVIEW

Whether the plaintiff in a civil rights action filed under 42 U.S.C. §1983 must allege bad faith on the part of the defendant in order to state a claim for relief.

STATEMENT OF THE CASE

The petitioner commenced this civil rights action in the District Court for the District of Puerto Rico in July of 1977. Petitioner claimed damages from respondent Astol Calero Toledo, the Superintendent of Police of the Commonwealth of Puerto Rico, and from the Commonwealth of Puerto Rico and the Police of the Commonwealth of Puerto Rico.[1] The case against the respondent was based on 42 U.S.C. §1983, with jurisdiction invoked under 28 U.S.C. §1331.

The claim against the respondent was for violation of the petitioner's substantive and procedural rights to due process of law in connection with his discharge from employment as a police officer. The allegations in his complaint set forth the following facts:

The petitioner had been employed since 1968 as a police officer in the Police Department of the Commonwealth of Puerto Rico. (Complaint, ¶4, A.2). Petitioner discovered that two other police officers had obtained false evidence and had offered it in evidence in a pending criminal prosecution. He reported this matter to his superior officer. (Complaint, ¶5, A.2-3). As a result of this report, the respondent transferred the petitioner

[1] The Commonwealth and the Police Department were dismissed and the petitioner did not appeal from that decision.

away from his normal duties and assigned him to the police academy with no investigative authority. (Complaint ¶7, A.3) However, an investigation by the Legal Division of the Police Department corroborated petitioner's accusations against the other officers, and exonerated him of any wrongdoing. (Complaint ¶8, A.3)

Subsequently, in April, 1976, the petitioner was subpoenaed by the defendant in the criminal case in question and he testified concerning the false evidence which had been offered by the two other police officers. (Complaint, ¶9, A.3) Thereafter, and as a result of the petitioner's court testimony, the respondent brought criminal charges against the petitioner for alleged wiretapping. (Complaint, ¶10, 11, A.3-4) The courts of Puerto Rico later found no probable cause for these criminal charges. (Complaint, ¶15, A.4).

On May 26, 1976, the respondent suspended the petitioner for the reason that he was under investigation. (Complaint, ¶12, A.4) On July 14, 1976, the respondent discharged the petitioner from his employment for violations of the Puerto Rico Police Regulations—contesting without basis the honesty, integrity and competence of other members of the force; and injurious, immoral or disorderly conduct. The discharge was effected without a hearing. (Complaint, ¶13, A.4) Petitioner specifically alleged that the discharge was based on the same factual allegations against him which had been investigated by the Legal Division of the Police Department and in connection with which petitioner had been exonerated. (Complaint, ¶14, A.4) Petitioner subsequently appealed the discharge to the Investigation, Prosecution and Appeals Commission (C.I.P.A.) and on December 1, 1976, the commission ordered his reinstatement with back pay. (Complaint, ¶16, A. 4-5)

Petitioner alleged that his discharge without hearing was in violation of Puerto Rican law, Act No. 26, of

1974 (25 L.P.R.A. 1001, et seq.), which requires a hearing prior to discharge. Petitioner thus claimed a violation of his constitutional right to procedural due process of law, and also alleged that the discharge violated his rights not to be arbitrarily discharged from public employment. (Complaint, ¶17, A.5) As a result of the wrongful acts of the respondent, petitioner has suffered stress, anxiety, embarrassment and impairment to his reputation. (Complaint, ¶18, A.5)

Respondent filed a Motion to Dismiss, which was granted by the district court.[2] Petitioner appealed to the Court of Appeals for the First Circuit, which affirmed, holding that the plaintiff in an action under 42 U.S. C. §1983 must allege bad faith on the part of the defendant in order to state a valid cause of action.

SUMMARY OF ARGUMENT

In an action under 42 U.S.C. §1983 a plaintiff must meet only two requirements in the complaint to state a claim for relief. He must allege an act or omission which caused a violation of his constitutional rights, and he must allege that the violation was committed under color of law. A civil rights plaintiff need not allege that the violation was committed with specific intent, malice or in bad faith.

Qualified immunity is an affirmative defense which official defendants in §1983 actions may raise where they believed in good faith that the actions they took were lawful and where there is an objectively reasonable basis for such a belief. There is no defense of qualified

[2] Respondent had already filed his answer prior to his Motion to Dismiss. His motion should have been filed as a motion for judgment on the pleadings under Rule 12 (c) of the Federal Rules of Civil Procedure. Neither party filed affidavits and the motion was not treated as one for summary judgment under Rule 56.

immunity available where an official has violated a plaintiff's clearly established constitutional rights, as in this case. The burden of pleading qualified immunity in an appropriate case is on the defendants, as may be seen by the decisions of this Court and all of the courts of appeals, with the exception of the First Circuit. Indeed, even absolute immunity is an affirmative defense which must be pleaded by defendants.

Sound policy reasons support the placing of the burden of pleading qualified immunity on defendants who would claim it. The defense rests both upon the official's state of mind, his subjective belief that he acted legally, and upon the specific legal or other basis he had for his actions at the time he took them. Nearly all of the information required to determine the validity of the defense in any given case will be initially in the possession of the defendant. While a defendant may easily place this matter in issue, should he choose to rely on this defense, it would be nearly impossible for plaintiffs in most cases to gather sufficient facts prior to filing the complaint to negative all possible bases for qualified immunity on the part of the defendant. The plaintiff, however, may be required to respond to a defendant's assertion of qualified immunity in the context of summary judgment, if there are no disputed issues of fact relevant to the question.

In the instant case, the petitioner has pleaded violations of well established rights under the First and Fourteenth Amendments. Under Puerto Rican law, he had a clear entitlement to an evidentiary due process hearing prior to his discharge from his position as a police officer. Respondent discharged petitioner without such a hearing, and thus deprived him of property and liberty without procedural due process of law. Moreover, peti-

tioner's discharge was in retaliation for the exercise of protected speech and therefore a violation of his constitutional rights under the First Amendment.

Petitioner had no obligation in this case to plead bad faith on the part of the respondent in order to state a claim for relief under §1983. Therefore, the affirmance below of the granting of respondent's motion to dismiss on that ground should be reversed.

ARGUMENT

I. The Plaintiff In An Action Under 42 U.S.C. §1983 Need Not Plead "Bad Faith" On The Part Of The Defendant In Order To State A Claim For Relief.

A. Petitioner has alleged violations of his constitutional rights committed under color of law, thus stating a claim for relief under 42 U.S.C. §1983.

This case comes to this Court following the dismissal of the complaint by the District Court on the grounds that the complaint had failed to adequately state a claim for relief. In *Conley* v. *Gibson,* 355 U.S. 41 (1957), this Court indicated the narrow circumstances under which dismissal of the complaint is warranted.

> In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.
>
> *Id.*, at 45-46.

In response to the argument by the defendants in that case that the complaint had failed to set forth specific facts in support of a claim of discrimination, the Court held that such facts were unnecessary in the complaint. The Court specifically eschewed a technical view of the rules requiring artful and overly precise pleading:

> The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.
>
> *Id.*, at 48.

This standard has been reaffirmed many times by this Court, including recently in a leading case on the qualified immunity of executive officers in suits under 42 U.S.C. §1983. *Scheuer* v. *Rhodes,* 416 U.S. 232 (1974). The Court reiterated that the issue raised by a motion to dismiss is not whether the plaintiff will ultimately prevail, but only whether he is entitled to offer evidence to support his claims. *Id.*, at 236.

This Court has held that in order to state a claim under 42 U.S.C. §1983 the plaintiff must allege (1) an act or omission by a person causing a violation of plaintiff's constitutional rights, which was (2) committed under color of law. *Monroe* v. *Pape*, 365 U.S. 167 (1961). In the present case, petitioner pleaded that his right to procedural due process of law under the Fourteenth Amendment was violated when the respondent, Superintendent of Police, discharged him from his position as a police officer without the pre-termination hearing required to protect his property and liberty interests. Petitioner further alleged facts that established that his discharge was made in retaliation for speech protected under the First Amendment.[3] The complaint thus clearly

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[3] The constitutional rights at issue are discussed fully in Section II, *infra,* at pp. 40-51.

established that respondent deprived petitioner of constitutional rights under color of law and thereby stated a claim under §1983. For the reasons which follow, petitioner submits that no more was required of him in his initial pleading in this case.

B. The decisions of this court establish that qualified immunity is an affirmative defense which must be pleaded by the defendant in an action under 42 U.S.C. §1983.

In this case, the court of appeals held that petitioner's complaint was properly dismissed because it failed to make the allegation that respondent had acted maliciously or in bad faith. Petitioner's fundamental submission is that where a plaintiff alleges intentional acts which violated his constitutional rights no allegation as to the defendant's state of mind is required.[4]

Whether a plaintiff must allege that the defendant acted with a specific intent to violate his constitutional rights in order to state a claim under §1983 was decided by this Court in the landmark case of *Monroe* v. *Pape, supra*. The Court had earlier construed the statute imposing criminal penalties for violations of civil rights, 18 U.S.C. §242, which on its face punishes acts "wilfully" done, to require "a specific intent to deprive a person of a federal right" to sustain a conviction. *Screws* v. *United States,* 325 U.S. 91, 103 (1945). However, the Court ruled in *Monroe* v. *Pape* that no such specific intent was required in a civil case, holding:

[4] Because petitioner has alleged intentional acts by respondent, this case does not raise the question of whether a claim for relief under §1983 may be premised on negligent conduct. Cf., *Procunier* v. *Navarette,* 434 U.S. 555 (1978); *Baker* v. *McCollan,* _____ *U.S.* _____, *99 S. Ct. 2689 (1979).*

> Section 1979 should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.
>
> 365 U.S. at 187.[5]

The decision in *Monroe* v. *Pape* was reaffirmed in *Pierson* v. *Ray,* 386 U.S. 547 (1967), where the Court made clear that the requirements which the plaintiff must satisfy to state a claim under §1983 and the defenses available to officials in such suits are two different matters:

> We also held that the complaint should not be dismissed for failure to state that the officers had 'a specific intent to deprive a person of a federal

[5] Justice Frankfurter dissented in *Monroe* v. *Pape* on the basis of his reading of the phrase "under color of law." However, he was in complete agreement with the Court that no specific intent was required. He believed that the specific intent required under the criminal provision was far less strict than it appeared to be ("an abstraction serving the purposes of a constitutional need without impressing any actual restrictions upon the nature of the crime which the jury tries," *id.*, at 207), and that imposing a requirement of pleading intent in civil actions would be fruitless:

> But if intent to infringe 'specific' constitutional rights comes in practice to mean no more than intent without justification to bring about the circumstances which infringe those rights, then the consequence of introducing the specific intent issue into a litigation is, in effect, to require fictional pleading, needlessly burden jurors with abstruse instructions, and lessen the degree of control which federal courts have over jury vagaries.
>
> If the courts are to enforce §1979, it is an unhappy form of judicial disapproval to surround it with doctrines which partially and unequally obstruct its operation. Specific intent in the context of the section would cause such embarrassment without countervailing justification. Petitioners' allegations that respondents in fact did the acts which constituted violations of constitutional rights are sufficient.
>
> *Id.*, at 207-208.

right,' but this holding, which related to the requirements of pleading, carried no implications as to which *defenses* would be available to police officers.

Id., at 556. (Emphasis supplied.)

Pierson v. *Ray* specifically held that the count of the complaint in question should not be dismissed.

Considerable elaboration of the good faith defense has occurred of course since the decision in *Pierson* v. *Ray,* both in this Court and in the lower federal courts. Nonetheless, proof of an official's good faith and assertion of qualified immunity from liability have consistently been treated as matters of defense both in this Court and by the vast majority of the lower federal courts.

In *Scheuer* v. *Rhodes, supra,* this Court reversed the dismissal of complaints alleging that an improper deployment of the National Guard had violated constitutional rights. The Court specifically held that the good faith of the defendants could not be taken for granted:

> In dismissing the complaints, the District Court and the Court of Appeals erroneously accepted as a fact the good faith of the Governor, and took judicial notice that 'mob rule existed at Kent State University.' There was no opportunity afforded petitioners to contest the facts assumed in that conclusion. There was no evidence before the courts from which such a finding of good faith could be properly made and, in the circumstances of these cases, such a dispositive conclusion could not be judicially noticed . . . The complaining parties are entitled to

> be heard more fully than is possible on a motion to dismiss a complaint.

Id., at 250-251.[6]

Scheuer v. *Rhodes* also makes clear that qualified immunity requires both an objective basis and the subjective belief of the official that his acts were lawful:

> It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.

Id., at 247-248.

It stands to reason that the burden of establishing the subjective element is on the defendant. Although the plaintiff may seek to impeach a defendant's claim of a good faith belief that his actions were lawful based on the conduct and statements of the defendant associated with the act in question, in most cases the only direct evidence of the defendant's state of mind will be his own testimony, whether by affidavit in a summary judgment motion or in the witness box at trial. Under *Conley* v. *Gibson, supra,* the plaintiff's allegation in the complaint that the acts of the defendant in fact did

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[6] The holding of *Scheuer* v. *Rhodes* that good faith cannot be assumed or judicially noticed is in direct conflict with the decision of the court below in the instant case. The court of appeals in this case held:

> Where, as here, a public official is being sued for action in his official capacity, it is assumed that he wears a cloak of qualified immunity and the complaint must allege and specify facts that show bad faith or state why in this particular case the cloak was shed.

602 F.2d at 1020.

violate his constitutional rights is enough notice of plaintiff's claim to fairly shift the burden to the defendant to come forward and claim that he believed that the actions he took were lawful, if he in fact chooses to make that defense.[7]

Wood v.*Strickland*, 420 U.S. 308 (1975), made clear that good faith alone is not sufficient to establish immunity, and that an act which violated a student's clearly established constitutional rights could not be justified on the basis of either ignorance or disregard of settled, indisputable law. The Court reversed the directed verdicts that had been granted by the district court on the ground of immunity, despite the district court's conclusion that there was no evidence of malice.

Here, as in *Wood* v. *Strickland,* the plaintiff's constitutional right to procedural due process was clearly established. Therefore, plaintiff was under no obligation to plead bad faith or malice. Moreover, the defendant's good faith, if he could prove it, would be insufficient to establish a defense of qualified immunity.

The most recent cases by the Court on the question of qualified immunity have continued to denominate the matter as one of defense. In *Procunier* v. *Navarette, supra,* both the majority opinion of the Court, *id.*, at

[7] Of course, a defendant may choose not to make a good faith defense. First, it may not be true that he considered the implications of his conduct for plaintiff's constitutional rights and believed that he was acting lawfully, or that he considered the legality of his acts at all. Second, even if the defendant honestly did act in good faith, he may decide as a tactical matter that his best defense lies in minimizing his participation in the conduct that led to plaintiff's claimed injuries rather than in calling attention to his role by explicitly offering testimony on the details of his state of mind. Whether or not to submit the question of good faith to a jury on the issue of liability should be within the control of the defendant in most cases.

566, and the dissenting opinion of Mr. Justice Stevens, *id.*, at 569, characterize qualified immunity as a defense. This Court had granted certiorari on that count of plaintiff's complaint which alleged that defendants had negligently interfered with his outgoing correspondence in violation of his constitutional rights. The defendants in the action had raised the defense of good faith, by filing a summary judgment motion with supporting affidavits. This Court then considered the issue of whether the plaintiff would be able to defeat the defense of good faith and concluded that he would not. This conclusion was based on two considerations. First, the constitutional right involved had not been clearly established at the time of the alleged interference with mail and thus qualified immunity could not be negatived on that branch of *Wood* v. *Strickland, supra.* Second, since the plaintiff had pleaded negligence in the count in question, he had ruled out the possibility of a malicious denial of his rights on the face of his own pleading. Of course, in a situation as here, where the complaint alleges intentional acts resulting in a constitutional violation, plaintiff is entitled to contest the defendants' claim of good faith with evidence to the contrary.[8]

[8] The court of appeals in *Procunier* had held that the counts in which malice was alleged by the plaintiff could not be resolved on summary judgment because there were issues of fact to be tried with respect to the good faith defense. The court reached this conclusion, however, not on the basis of the language in the complaints, but on the affidavits which the plaintiff Navarette had filed: "But here appellees' assertions that they acted in the good faith belief that they were complying with valid regulations are contradicted by Navarette's affidavits. This raised an issue of fact and precluded summary judgment." *Navarette* v. *Enomoto,* 536 F.2d 277, 280 (9th Cir. 1976).

Butz v. *Economou,* 438 U.S. 478, 502-503, 507 (1978) also labels qualified immunity as a defense. The Court made clear that the provisions for summary judgment in the Federal Rules of Civil Procedure are fully adequate to protect officials from frivolous lawsuits, even though they are clothed only with qualified immunity rather than shielded by absolute immunity. Complaints which fail to state a compensable claim for relief may, of course, be dismissed. *See, Baker* v. *McCollan, supra*[9]. However, once a claim for relief has been stated, it is the plaintiff's response to a summary judgment motion in which a defendant has raised claim of qualified immunity that will determine whether a case proceeds to trial, not the allegations in the complaint. *Id.,* at 508. Of course, this follows from the pertinent provisions of Rule 56(e) of the Federal Rules of Civil Procedure:

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[9] In *Baker,* this Court held there was no violation of the plaintiff's constitutional rights where his brief incarceration was based on a facially valid warrant. Evidence of bad faith on the part of the defendant would not have established liability under §1983, because no constitutional violation had occurred. The defendant prevailed, not because of any "good faith" on his part, but because the plaintiff had not established a constitutional violation. As the Court explained:

> In any event, before the relationship between the defendant's state of mind and his liability under §1983 can be meaningfully explored, it is necessary to isolate the precise constitutional violation with which he is charged. . . . The first inquiry in any §1983 suit, therefore, is whether the plaintiff has been deprived of a right 'secured by the Constitution and laws.' If there has been no such deprivation, the state of mind of the defendant is wholly immaterial.
>
> *Id.,* at 2692.

The dissenting Justices were in agreement with this proposition, noting that the sheriff's good faith defense was not an issue presented in the case. *Id.,* at 2700 (Stevens, J., dissenting).

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

It is apparent that a requirement that a plaintiff plead bad faith or malice in his complaint would be of little moment as a practical matter, because as soon as the defendant files a motion for summary judgment based on his good faith the plaintiff's complaint has no evidentiary value and affidavits are required.

Meritorious claims against officials with qualified immunity will require summary judgment proceedings or a trial to resolve disputed issues concerning the good faith defense. Indeed, this is the essential procedural difference between the defenses of absolute immunity and qualified immunity. In *Imbler* v. *Pachtman,* 424 U.S. 409, 424-428 (1976), the Court held that prosecutors were entitled to absolute immunity in order to accord them special protection from the procedural requirements of the qualified immunity defense. Mr. Justice Powell articulated the difference between the two forms of immunity:

> The procedural difference between the absolute and qualified immunities is important. An absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity. The fate of an official with qualified immunity depends upon the circumstances and motivations of his actions, as established by the evidence at trial.
>
> *Id.,* at 419, fn. 13.

An official defendant with only qualified immunity must come forward with evidence to establish his subjective good faith belief that his acts were lawful, and evidence of the reasonable basis for the belief. The decision to accord prosecutors absolute immunity in *Imbler* v. *Pachtman* was based on the perception that they would "face greater difficulty in meeting the standards of qualified immunity than other executive or administrative officials." *Id.*, at 425.

Moreover, even though the immunity, if properly asserted, of certain officials is absolute, it is still a matter of defense, and has traditionally been referred to as a defense by this Court. *Barr* v. *Mateo,* 360 U.S. 564, 569 (1959). Resolution of absolute immunity cases involves two questions. First, is the official defendant in general entitled to absolute immunity? Second, do the particular facts and circumstances of the case in question involve acts performed by the official within the scope of his immunity? The law is now settled that several types of officials are, in general, entitled to an absolute immunity from suit. Thus, judges, *Pierson* v. *Ray, supra;* prosecutors, *Imbler* v. *Pachtman, supra;* legislators, *Tenney* v. *Brandhove,* 341 U.S. 367 (1951); and certain executive department officials whose functions partake of judicial or prosecutorial character, *Butz* v. *Economou, supra,* have absolute immunity from suit under §1983 for acts performed within the scope of their immunity.

However, when an official whose position has not previously been recognized as affording him absolute immunity asserts immunity as a defense in a civil action, the burden is on the official to justify the claim. In *Butz* v. *Economou, supra,* the Court concluded that in light of the principle that all officers of the government are creatures of the law and bound to obey it:

> federal officials who seek absolute exception from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope.
>
> *Id.*, at 506.

In cases where the general right of the official to absolute immunity is clear, a question may still arise as to the scope of the immunity. Although some such cases may be decided on the basis of the plaintiff's complaint,[10] in others this Court has indicated that a fuller evidentiary development of the issue is required.

For example, in *Doe* v. *McMillan,* 412 U.S. 306 (1973), the issue was whether the Public Printer and the Superintendent of Documents had absolute immunity under the Speech and Debate Clause for printing and distributing allegedly libelous legislative materials to the public. The Court held that such defendants had no "automatic immunity" and were obliged "to respond to private suits to the extent that others must respond in light of the Constitution and applicable laws." 412 U.S. at 316. The Court held that it had been error to dismiss the complaint on "threshold immunity grounds" *id.*, at 318, and remanded the case for further proceedings. In so doing, the Court noted that factfinding would be required on the question of the extent of the publication and distribution of the report in question in order to determine whether the legitimate legislative needs of

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[10] In some cases of a claim of judicial immunity, it is very likely that the matter can be disposed of on the basis of the complaint alone, since the only issue is whether the defendant judge had jurisdiction over the subject matter before him at the time he took the challenged action, a question of law. *Stump* v. *Sparkman,* 435 U.S. 349 (1978).

Congress, and thus the immunity of the defendants, had been exceeded. *Id.*, at 324-325.[11]

In *Dombrowski* v. *Eastland,* 387 U.S. 82 (1967), summary judgment in favor of the counsel of a Senate committee was reversed to determine if the attorney had acted beyond the limits of the protection afforded by the Speech and Debate Clause by collaborating with local officials to deny the plaintiff's rights. The Court held that "the factual refinement which can occur only as a result of trial," *id.*, at 84 was required in order to decide the issue. See, also, *Lake County Estates, Inc.* v. *Tahoe Regional Planning Agency,* _____ U.S. _____, 99 S.Ct. 1171 (1979).

Any immunity is an exception to the principle that public officials are liable under §1983 for violations of constitutional rights. The cases just discussed demonstrate that even those officials clothed with absolute immunity have the burden of establishing their defense. It follows, therefore, that officials with only a qualified immunity must plead and prove the elements of the defense.

[11] The matters which the Court indicated were relevant to final determination of the absolute immunity issue in *Doe* v. *McMillan* were facts in the possession of the official defendants and to which they had much greater and easier access than the plaintiffs in that case. Absent an opportunity for discovery, the plaintiffs might well have had no opportunity for acquiring the necessary information and therefore no basis for pleading that there was no absclute immunity. Rule 11, Federal Rules of Civil Procedure.

C. All of the Courts of Appeals except for the First Circuit place the burden of pleading qualified immunity on the defendant.

Only the First Circuit Court of Appeals has held that the plaintiff in a §1983 case has the burden of pleading bad faith or malice on the part of the defendant in the complaint. Every other circuit has held that the burden of pleading and/or proving good faith is on the defendants in such cases. In the leading case of *Skehan* v. *Board of Trustees of Bloomsburg State College,* 538 F.2d 53 (3d Cir., *en banc,* 1976), cert. denied 429 U.S. 979 (1976), a discharged state college teacher had filed suit under § 1983 for failure to receive a hearing prior to his termination. The court considered the question of which side has the burden of going forward with evidence and which side has the burden of proof with regard to the issue of qualified immunity. Analyzing the issue in the light of this Court's decisions in *Wood* v. *Strickland, supra,* and *O'Connor* v. *Donaldson,* 422 U.S. 563 (1975), the court squarely held:

> We therefore hold that in §1983 actions the burden is on the defendant official claiming official immunity to come forward and to convince the trier of fact by a preponderance of the evidence that, under the standards of *Wood* v. *Strickland,* official immunity should attach.
>
> 538 F.2d at 61-62.

See, also, *Safeguard Mutual Insurance Co.* v. *Miller,* 472 F.2d 732 (3d Cir. 1973); *Thompson* v. *Burke,* 556 F.2d 231, 239 (3d Cir. 1977).

Probably the most frequently cited lower federal court case on the subject of the good faith defense in

§1983 actions is *Bivens* v. *Six Unknown Named Agents,* 456 F.2d 1339 (2d Cir. 1972). After deciding that federal police agents have no absolute immunity from suit for constitutional deprivations, the court held that such officers do have a defense of good faith:

> And so we hold that it is *a defense to allege and prove* good faith and reasonable belief in the validity of the arrest and search and in the necessity for carrying out the arrest and search in the way the arrest was made and the search was conducted.
>
> *Id.,* at 1348. (Emphasis supplied.)

See, also, *Laverne* v. *Corning,* 522 F.2d 1144 (2d Cir. 1975).

Decisions from the other circuit courts of appeals are in harmony. *See, McCray* v. *Burrell,* 516 F.2d 357, 370 (4th Cir., *en banc,* 1975), cert. dismissed as improvidently granted, 426 U.S. 471 (1976); *Bryan* v. *Jones,* 530 F.2d 1210, 1213 (5th Cir., *en banc,* 1976), cert. denied, 429 U.S. 865 (1976); *Reimer* v. *Short,* 578 F.2d 621 (5th Cir. 1978), cert. denied, 440 U.S. 947 (1979);[12] *Glasson* v. *City of Louisville,* 518 F.2d 899,

[12] In *Cruz* v. *Beto,* 603 F.2d 1178 (5th Cir. 1979), the court stated that the plaintiff in a case against the director of a statewide prison system would have the ultimate burden of proof, once the defendant had placed good faith in issue. The opinion did not address itself to pleading requirements. The *en banc* opinion of the Fifth Circuit in *Bryan* v. *Jones, supra,* held that the plaintiff need not make out the absence of good faith in order to establish a prima facie case. Subsequent to *Cruz* v. *Beto,* the Fifth Circuit has ruled that where a plaintiff's constitutional rights were clearly established at the time of the act complained of, a lack of bad faith on the part of the defendant is unrelated to the determination of liability. *McNamara* v. *Moody,* 606 F.2d 621, 625-626, fn. 9 (5th Cir. 1979). *See,* also, *Reeves* v. *City of Jackson,* 608 F.2d 644, 650-651 (5th Cir. 1979). In addition, it might be noted that the opinion in *Cruz* v. *Beto* distinguishes between a high level official such as the director of a statewide prison system and lower officials such as police officers with regard to the allocation of the ultimate burden of proof on the issue of good faith. 603 F.2d at 1184. Whether or not all official defendants have the same scope of official immunity or whether the allocation of the ultimate burden of proof, or risk of non-persuasion, should be the same in every §1983 case, are issues which this Court need not and probably should not decide in connection with the instant matter. *Scheuer* v. *Rhodes, supra,* at 249.

907-910 (6th Cir. 1975), cert. denied, 423 U.S. 930 (1975); *Jones* v. *Perrigan,* 459 F.2d 81 (6th Cir. 1972); *Tritsis* v. *Backer,* 501 F.2d 1021 (7th Cir. 1974); *Brubaker* v. *King,* 505 F.2d 534 (7th Cir. 1974); *Boscarino* v. *Nelson,* 518 F.2d 879 (7th Cir. 1975); *Foster* v.*Zeeko,* 540 F.2d 1310 (7th Cir. 1976); *Landrum* v. *Moats,* 576 F.2d 1320, 1329 (8th Cir. 1978), cert. denied, 439 U.S. 912 (1978); *Gilker* v. *Baker,* 576 F. 2d 245 (9th Cir. 1978); *Donovan* v. *Reinbold,* 433 F.2d 738, 739 (9th Cir. 1970); *Martin* v. *Duffie,* 463 F.2d 464 (10th Cir. 1972); *Dellums* v. *Powell,* 566 F.2d 167, 176 (D.C. Cir. 1977), cert. denied, 438 U.S. 916 (1978); *Apton* v. *Wilson,* 506 F.2d 83 (D.C. Cir. 1974); *Zweibon* v. *Mitchell,* 516 F.2d 594, 670-671 (D.C. Cir. 1975), cert. denied 425 U.S. 944 (1976); *In re: Zweibon,* 565 F.2d 742 (D.C. Cir. 1977)

This impressive weight of authority demonstrates that the lower federal courts, with the singular exception of the First Circuit Court of Appeals, have concluded that the burden of pleading the good faith defense is on the official defendants in actions under §1983.

D. The court below incorrectly considered proof of bad faith as an element of petitioner's claims for relief under 42 U.S.C. §1983.

The Court of Appeals below held that because public officials enjoy qualified immunity from suit under §1983, "it follows that a plaintiff must allege as well as prove that a public official acted in bad faith to state a valid cause of action." 602 F.2d at 1020. The decision in this case follows a long line of First Circuit decisions holding that the plaintiff in an action under §1983 has the burden of alleging and proving bad faith on the part of an official defendant. *Kostka* v. *Hogg,* 560 F.2d 37 (1st Cir. 1977); *Stadium Films* v. *Baillargeon,* 542 F.2d 577, 579 (1st Cir. 1976); *Gaffney* v. *Silk,* 488 F.2d 1248 (1st Cir. 1973); *Harrison* v. *Brooks,* 446 F.2d 404 (1st Cir. 1971); *City of Boston* v. *Massachusetts Port Authority,* 444 F.2d 167 (1st Cir. 1971); *Cobb* v. *City of Malden,* 202 F.2d 701 (1st Cir. 1953).

The First Circuit rule requires the plaintiff to allege and prove subjective bad faith on the part of the defendant, even if there is no objective basis for a claim of good faith by the official. This is obvious from the result below, where the denial of procedural due process was in violation of petitioner's settled constitutional rights.[13] Moreover, in *Gaffney* v. *Silk, supra,*[14] one of the principal cases relied upon by the Court of Appeals

[13] See discussion *infra* at pp. 40-46.

[14] *Gaffney* v. *Silk* was also a procedural due process case, in which the plaintiff had alleged the termination of disability benefits without a hearing. The Court required an allegation of bad faith, although it recognized that termination of benefits without a hearing violated the plaintiff's federally protected rights under *Goldberg* v. *Kelly,* 397 U.S. 254 (1970).

below, 602 F.2d at 1020, the First Circuit specifically noted the possibility of measuring good faith either by objective or subjective criteria and went on to say:

> it is the clear rule in this circuit that liability will attach only where 'the defendants subjectively realized [that their action] would result in depriving the plaintiff of a right or privilege secured by the Constitution of the United States.'
>
> 488 F.2d at 1281 (citing *Cobb* v. *City of Malden, supra,* at 707).

Application of the strict requirements of the First Circuit rule would make it all but impossible to establish liability in most cases. Petitioner has alleged that he could not be fired except for just cause, that he was entitled by local law to a pre-termination hearing and that the respondent failed to provide a hearing prior to dismissal. It is difficult to imagine what more could be adduced to establish that the denial of his due process rights was made in "bad faith." Apart from rare cases where direct evidence might exist of an employer's malicious statements against an employee, the First Circuit rule would make it exceedingly difficult to establish any liability under §1983.[15] It may readily be seen that this rule does "deny much of the promise of §1983." *Wood* v. *Strickland, supra,* at 322.

The rule in the First Circuit has developed, at least in part, due to a serious misreading of this Court's deci-

[15] This was candidly recognized by Judge Magruder in *Cobb* v. *City of Malden, supra* at 707 (concurring opinion), when he wrote: "I don't suppose for a moment that plaintiffs will be able to establish what it is necessary for them to show in order to recover damages."

sion in *Snowden* v. *Hughes*, 321 U.S. 1 (1943). In that case, a candidate for state office who alleged that he had been illegally denied his seat presented both due process and equal protection violations in his complaint. The Court held that there was no constitutional due process violation because only state law had been violated. The Court went on to discuss the equal protection violation, and concluded that a cause of action had not been established because the plaintiff had not demonstrated intentional or purposeful discrimination.

In *City of Boston* v. *Massachusetts Port Authority, supra,* the plaintiff sued for the diminished value of public school property due to airport noise. Only a due process claim was raised. Nevertheless, the court's opinion cited *Snowden* v. *Hughes, supra,* for the mistaken general proposition that a showing of purposeful discrimination was necessary "in order to raise a claim under the Fourteenth Amendment." 444 F.2d at 169. Thus it would appear that the court misapplied the intent and purpose required to establish a claim under the Equal Protection Clause to the issue of what is required to establish other Fourteenth Amendment violations. See, also, *Harrison* v. *Brooks, supra,* at 407.

Snowden v. *Hughes, supra,* like the recent cases of *Washington* v. *Davis*, 426 U.S. 229 (1976), *Arlington Heights* v. *Metropolitan Housing Corp.*, 429 U.S. 252 (1977) and *Estelle* v. *Gamble*, 429 U.S. 97 (1976), reflect the fact that there are causes of action under 42 U.S.C. §1983 where this Court has held that the plaintiff must make a showing which in some respect involves the defendant's state of mind. These cases, however, are readily distinguishable from the instant matter and from other §1983 actions in which the defendant's state of mind is irrelevant to the substantive constitutional law.

In *Washington* v. *Davis, supra,* and *Arlington Heights* v. *Metropolitan Housing Corp., supra,* this Court held that discriminatory purpose or intent is an essential element of an equal protection violation. The Court held that proof of the discriminatory impact of an official policy was not sufficient to establish an equal protection violation. *Id.*, at 239. The evil prohibited by the Constitution, these cases make clear, is not that people may be treated differently by policies or laws which are neutral on their face. The essence of the constitutional violation is the conscious implementation of policy which leads to invidious discrimination against a citizen or group.

Moreover, even in equal protection cases, the precise requirements of a prima facie case will vary somewhat from issue to issue. In addition, the nature of the evidence required to show the requisite intent will depend greatly on the facts and circumstances of each case. *Arlington Heights* v. *Metropolitan Housing Corp., supra,* at 265-271; *Washington* v. *Davis, supra,* at 252-254 (Stevens, J., concurring). In any individual case, much of this evidence will not be available to a plaintiff until after discovery has been completed. Thus even where the plaintiff ultimately must prove discriminatory intent, it would be unrealistic to demand that all of the pertinent facts from which intent might be inferred be set forth in the complaint.

In *Estelle* v. *Gamble, supra,* this Court held that in order to prove a violation of the Eighth Amendment, a prisoner denied medical attention must establish deliberate indifference to his serious medical needs. This is because the Eighth Amendment only proscribes cruel and unusual punishments. A denial of medical attention only becomes cruel and unusual when done with some

degree of recklessness or malice. As in the equal protection cases, proof of the defendant's state of mind is required by the nature of the substantive right being enforced.

In contrast to these cases, the constitutional violations in the instant case do not depend in any way upon proof of the defendant's state of mind as a matter of substantive law. Malice is not required where a plaintiff's clearly established procedural due process rights have been violated. *Wood* v. *Strickland, supra.* In *Carey* v. *Piphus,* 435 U.S. 247 (1978), students had been suspended from school without a hearing. The district court specifically found that the school officials did not act with a malicious intention to cause a deprivation of constitutional rights or other injury to the students, and that they had acted with the belief that they were protecting the integrity of the education process. *Id.,* at 251-52, fn. 6. Nonetheless, the Court held that the students had been deprived of their rights to procedural due process. *Id.,* at 263-65. Although the absence of bad faith might bar an award of punitive damages, *id.,* at 275, fn. 11; *Carey* holds that it is no bar to an award of nominal damages or compensatory damages for mental and emotional distress. Similarly, proof of bad faith is not required to establish a violation of First Amendment rights.[16]

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[16] Proof of a First Amendment violation in connection with the termination of public employment under *Mt. Healthy City School District* v. *Doyle,* 429 U.S. 274 (1977), is discussed *infra,* at pp. 48-49.

E. Defendants must have the burden of pleading official immunity, because the information on which the defense is based is uniquely within their control.

Sound police reasons support the conclusion that qualified immunity is an affirmative defense which must be pleaded by the defendants under Rule 8(c) of the Federal Rules of Civil Procedure. First, the good faith defense is a matter of confession and avoidance. The defense comes into play only when a constitutional violation has been established. At that point judicially created immunity protects the official from liability in money damages for policy reasons which in no way contradict the plaintiff's claim that his rights have been violated. Such an exemption from liability in damages is a classic example of what constitutes an affirmative defense under the rule. As Judge (then Dean) Charles E. Clark, the Reporter for the original Advisory Committee, has stated:

> It seems to be considered only fair that certain types of things which in common law pleading were matters in confession and avoidance—i.e., matters which seemed more or less to admit the general complaint and yet to suggest some other reasons why there was no right—must be specifically pleaded in the answer, and that has been a general rule. Proceedings, Washington and New York City Institutes on the Federal Rules, 1939. p. 49.[17]

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[17] In this respect the qualified immunity defense is analytically similar to the defense of "qualified privilege" to a slander suit, a matter which must be raised by the defendant in the answer. See, e.g., *White* v. *Chicago, Burlington and Quincy Railroad,* 417 F. 2d 941, 946 (8th Cir. 1969).

Second, lower federal court cases in which defendants have asserted qualified immunity amply demonstrate that practical realities dictate considering the matter as an affirmative defense. The variety of justifications which have been put forward by defendants to avoid liability for constitutional violations is extremely wide. It would be impossible for plaintiffs to anticipate or investigate prior to filing the complaint all of the potential sources of a defendants' belief that his actions were lawful. See, *McCray* v. *Burrell, supra,* at 370-371.

Defendants may rely upon state law or local ordinances, *Traylor* v. *City of Amarillo,* 492 F. 2d 1156 (5th Cir. 1974); a state court order, *Wright* v. *Florida,* 495 F. 2d 1086 (5th Cir. 1974); the generally uncertain state of the law, *Laverne* v. *Corning, supra,* at 1150; the advice of counsel, *Crowe* v. *Lucas,* 595 F.2d 985, 992 (5th Cir. 1979), *Dellums* v. *Powell, supra,* at 185-186; administrative practice, *Mukmuk* v. *Commissioner of the Dep't of Correctional Services,* 529 F.2d 272, 275 (2d Cir. 1976); police department manuals, *Landrum* v. *Moats,* 576 F.2d 1320 (8th Cir. 1978); the unwritten practice of a police department, *Thompson* v. *Anderson,* 447 F.Supp. 584 (D. Md. 1977); long standing custom, *Eslinger* v. *Thomas,* 476 F.2d 225 (4th Cir. 1973).[18]

Such asserted justifications for unconstitutional actions are clearly "matters on which much of the relevant evidence will be possessed exclusively by the officials themselves." *Apton* v. *Wilson,* 506 F.2d 83, 95 (D.C.

[18] The above cases are not cited because petitioner necessarily agrees that the claim of qualified immunity was well taken in each case, but merely in order to demonstrate the variety of claims official defendants have made.

Cir. 1974). For example, the issue in determining a defendant's good faith is not merely whether there existed a state statute on which he might have relied, but whether he actually did rely on such a statute and whether, under the facts of the case as known to him at the time, it was reasonable for him to believe the statute applied to the situation at hand. *Fidtler* v. *Rundle,* 497 F.2d 794, 801-802 (3d Cir. 1974).

Similarly, where the official's defense is reliance on the advice of counsel, plaintiff would, absent discovery, have no way of knowing whether such advice had been sought. Moreover, the circumstances under which advice is sought, including what information the defendant furnished to his attorney, may be critical in determining whether the defendant really acted in good faith. *Dellums* v. *Powell, supra.* See, also, *Martin* v. *Duffie, supra* (plaintiff not required to negative all possible sources of probable cause for warrantless arrest to establish prima facie case). These cases demonstrate that basic considerations of fairness, as well as practical realities of trial practice, compel the conclusion that defendants must have the burden of pleading and proving the qualified immunity defense.

II. Petitioner Has Alleged Violations Of Clearly Established Constitutional Rights Under The First and Fourteenth Amendments

Petitioner's complaint alleges violations of two significant, well-established constitutional rights. First, he was denied his right to procedural due process under the Fourteeenth Amendment when respondent deprived him of his property right to his employment and of his liberty, by discharging him without a pre-termination hearing. Second, petitioner was deprived of his right under the First Amendment to be free from retaliatory

discharge based on protected speech. We address these issues in turn.[19]

A. The discharge of petitioner without a prior hearing was a deprivation of property and liberty without due process of law

At the time of his dismissal from the police force, petitioner was a permanent employee under the laws of Puerto Rico and could lawfully be discharged only for cause and only *after* a due process hearing. To understand the basis for petitioner's fundamental entitlement to a pre-termination hearing, it is important first to discuss the development of Puerto Rican law establishing the rights of police officers to be free from summary and arbitrary discharges.

Prior to the passage of The Puerto Rico Police Act of 1974, Act No. 26 of 1974, 25 L.P.R.A. §1001, et seq. (hereinafter "Act No. 26"), there was no right to a pre-discharge hearing. The former statute, 25 L.P.R.A. §221(j)(k), empowered the Superintendent of Police to discharge any officer for a "serious shortcoming" and provided the employee with a post-termination hearing only if he perfected an appeal within ten days of

[19] Our discussion of the substantive constitutional issues in this case is not meant to suggest that they are ripe for decision at this time. To the contrary, it should be noted that neither of the courts below has passed on these issues, and, as the discussion below will make clear, their resolution may turn on factual matters that must await discovery and trial. The purpose of this discussion is to provide a contextual framework for our argument that petitioner had no burden to plead respondent's bad faith, by demonstrating that petitioner alleges *prima facie* violations of well-settled constitutional rights.

discharge.[20] Act No. 26 made a fundamental change in this statutory scheme, by providing that discharge can only be effected "*after*" one has had the "opportunity to be heard." 25 L.P.R.A. §1014(b) (emphasis supplied).[21]

Act No. 26 does not, by its own provisions, describe the details of the hearing required, but it directs the Superintendent of Police to promulgate regulations to establish hearing procedures. 25 L.P.R.A. §§ 1007, 1014(b). Respondent Toledo, Superintendent of Police, personally promulgated the applicable regulations, which became effective June 20, 1976, nearly one month before the discharge of petitioner.[22] These regulations

[20] At this post-termination hearing, an employee was entitled to the full panoply of due process protections, including notice of charges, opportunity to respond by offering evidence, right to cross-examine adverse witnesses, assistance of counsel and to a decision supported by sufficient evidence. See, e.g. *Lavergue* v. *Police Commission*, 27 P.R.R. 758 (Supreme Ct. 1919); *Lopez* v. *Tugwell, Governor*, 62 P.R.R. 471 (Supreme Ct. 1943).

[21] Act No. 26, 25 L.P.R.A. §1002 provides that probationary officer ("Cadets") must complete two years of duty before they become permanent employees ("Guardsman" or some higher rank). Under §1008, a probationary employee may be discharged upon the judgment of the Superintendent that he lacks "the aptitude to be a police member, or his habits and reliability do not warrant his continuation in the Corps."
No such power for summary removal exists with regard to permanent employees who can only be discharged for cause and after a full due process hearing. Petitioner is a permanent employee under this statute, having been employed for eight years at the time of his discharge (Complaint, ¶4, A. 2).

[22] Act No. 26, 25 L.P.R.A. §1007 provides that the Regulations were to take effect sixty days after they were signed by the Governor. The Regulations were approved and signed by Rafael Hernandez Colon, Governor of Puerto Rico, on April 21, 1976. Peti-

provide in detail for a pre-termination due process hearing that affords an employee accused of a "serious fault" substantial protections.[23]

The Regulations contemplate that an Investigator will commence the process by advising the employee of the accusation made against him, of his right to testify or not, of the fact that any testimony given may be used against him, of his right to legal assistance and of his right to obtain a list of the witnesses developed by the Investigator in the event he wishes to call any of them in his favor (Article XI, Sec 1c). A hearing is then held before a permanent examiner, who affords the employee the right to offer witnesses and to confront the witnesses against him. The employee may appear in person or in writing and has the right to be represented by counsel. (Article XI, Sec. 1d).

The Superintendent then makes his decision, "after examining and analizing (sic) the file and after assuring himself that the accused had the opportunity to be heard." (Article XI, Sec. 1e). Thus, whatever question might be raised concerning the meaning of the term "opportunity to be heard" as set forth in Act No. 26, respondent, under this Act, has provided specific, unambiguous content to that protection: opportunity to be heard means a full panoply of due process protections, prior to termination from employment.[24]

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tioner requests the Court to take judicial notice of these Regulations. A copy of the pertinent portions of the Regulations will be submitted to the Clerk of this Court.

[23] The pertinent portions of the Regulations are set forth at pp. 6-8 of the brief.

[24] This phrase is the lynchpin of procedural due process and has been invoked as a kind of shorthand by this Court in a variety of cases ordering due process protections. See, e.g., *Grannis* v. *Ordean*, 234 U.S. 385, 394 (1914); *Goldberg* v. *Kelly*, 397 U.S. 254, 267 (1970); *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 162 (Frankfurter, J., concurring). Given this established judicial gloss to the term "opportunity to be heard," it can hardly be doubted that in using this phrase the Legislature of Puerto Rico meant to insure at least the rudimentary due process protections of notice, opportunity to testify and confrontation of adverse witnesses. In promulgating the regulations, Respondent surely understood this term to incorporate fundamental notions of due process.

The Regulations further provide a comprehensive listing of the 50 specific serious faults for which an employee may be discharged under 25 L.P.R.A. §§1012 and 1014. Just cause for terminations is thus spelled out in explicit and specific terms by these Regulations. Less severe misconduct ("slight shortcomings") is punishable by at most a ten day suspension and a written reprimand. 25 L.P.R.A. §1013.

In *Board of Regents* v. *Roth*, 408 U.S. 564 (1972) and *Perry* v. *Sindermann*, 408 U.S. 593 (1972), this Court held that it is provisions of local law such as those embodied in Act No. 26 and the Regulations promulgated by Respondent which define property interests in employment for the purpose of determining when constitutional due process protections are required. Puerto Rican law clearly provided petitioner with a "legitimate claim of entitlement," *Board of Regents* v. *Roth, supra*, at 577, to continued employment in the absence of just cause for his discharge and compliance with the procedural requirements of the Regulations.[25]

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[25] The entitlement of an employee to continue employment need not be spelled out on the face of a statute to create a property right. In *Roth*, the Court noted that property rights are created by "rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.*, at 577. In *Perry* v. *Sindermann*, the Court held that the unwritten "common law"

Once it is clear that an employee has a property right in his government position, he is protected by the due process clause of the Fourteenth Amendment. In *Board of Regents* v. *Roth,* this Court stated that the Constitution requires a hearing prior to discharge where a public employee has such a property right:

> When protected interests are implicated, the right to some kind of prior hearing is paramount.[7]
>
> 7. Before a person is deprived of a protected interest, he must be afforded opportunity for some kind of a hearing 'except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.' *Boddie* v. *Connecticut,* 401 U.S. 371. 'While "[m]any controversies have raged about . . . the Due Process Clause," . . . it is fundamental that except in emergency situations (and this is not one) due process requires that when a State seeks to terminate [a protected] interest . . ., it must afford "notice and opportunity for hearing appropriate to the nature of the case" *before* the termination becomes effective.' Bell v. Burson, 402 U.S. 535. (emphasis in original).

The petitioner in the instant case had the strongest possible claim on a pre-termination hearing. Not only does he have an absolutely clear right to continued employment in the absence of just cause for his dismissal, his right to a hearing prior to discharge is protected both by the Constitution and by local law.

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of a university community could create property rights even in the absence of a formal tenure system. *Id.*, at 602. It follows that officially promulgated regulations required by a statute provide a sufficient foundation for petitioner's claim of a property right.

The present situation is readily distinguishable from the result reached in *Bishop* v. *Wood,* 426 U.S. 341 (1976). The plaintiff in that case "held his position at the will and pleasure of the city," *id.,* at 345, both because he had no right to be free from discharge except for cause and no right to a hearing under state law. This Court held that the plaintiff simply had no property interest in his position and therefore rejected his claim of a right to a pre-termination hearing. The rationale of the case, however, reaffirms that where state law does prohibit termination except for cause and provides for procedural protections in a pre-termination hearing, the Fourteenth Amendment protects a government worker's interest in his employment status and a due process hearing is required before termination may be effected.

In *Arnett* v. *Kennedy,* 416 U.S. 134 (1974), the statute which granted the plaintiff employee the right not to be discharged except for cause also limited his procedural rights prior to termination to notice of charges and an opportunity to appear before the decision-making official. An evidentiary hearing was not available under the statute until after discharge. Although that case presented a statutory scheme diametrically opposed to the statutes and regulations of Puerto Rican law, thus compelling the result that the employee was not entitled to a pre-termination hearing, the nature of the test employed in each of the separate opinions in *Arnett* leads to the conclusion that a hearing was required prior to the petitioner's discharge in this case.

All of the concurring and dissenting opinions recognized that the determination of the constitutional question of whether a hearing need be held prior to discharge involved a balancing test in which the Govern-

ment's asserted interests are balanced against those of the discharged employee. *Id.*, at 167-168 (Powell, J., concurring), *id.*, at 188 (White, J., concurring in part and dissenting in part), *id.*, at 212 (Marshall, J., dissenting). Although the six Justices represented by those opinions concluded that the government itself could not limit by statute the degree of due process required by the Constitution, it does not follow that the government may not limit its own definition of its asserted interests such that the balance tips in favor of requiring a pre-termination hearing. In the instant case, the legislature of Puerto Rico in Act No. 26 and the respondent himself in the Regulations, have already determined that they do not assert any interests in support of immediate discharge of employees sufficiently important to avoid a pre-termination hearing. Indeed, the statute and the Regulations were amended in 1974 precisely to provide for a hearing prior to discharge. Thus it is clear that in this case the constitutional line should be drawn under the general principles of *Board of Regents* v. *Roth, supra,* and in favor of a pre-termination hearing.

The plurality opinion of the Court in *Arnett, supra,* also compels the conclusion that petitioner in the instant matter was entitled to a hearing prior to discharge. Mr. Justice Rehnquist's opinion makes clear that the legislature which establishes the property right in employment may itself determine the level of constitutional due process protection which the right shall receive:

> Where the focus of legislation was thus strongly on the procedural mechanism for enforcing the substantive right which was simultaneously conferred, we decline to conclude that the substantive right may be viewed wholly apart from the procedure provided for its enforcement. The

> employee's statutorily defined right is not a guarantee against removal without cause in the abstract, but such a guarantee as enforced by the procedures which Congress has designated for the determination of cause. *Id.*, at 152.

The opinion rejects the notion of placing any "hobbling restrictions on legislative authority in this area." *Id.*, at 154.

In addition to the clear deprivation of petitioner's property rights without due process of law, the discharge alleged here also deprived petitioner of a protected liberty interest as well. He was discharged from his position as a police officer for *inter alia*, "injurious, immoral or disorderly conduct" in violation of the Regulations. (Complaint, ¶13, A. 4). This is clearly sufficient to implicate the loss of liberty involved when one's good name, reputation, honor or integrity are at state. *Board of Regents* v. *Roth, supra,* at 573. See, also, *Joint Anti-Fascist Refugee Committee* v. *McGrath, supra,* at 185 (Jackson, J., concurring); *Willner* v. *Committee on Character,* 373 U.S. 96 (1963).[26]

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[26] In *Paul* v. *Davis,* 424 U.S. 693 (1976), this Court ruled that mere loss of reputation, without loss of any tangible benefit or violation of other constitutional right did not implicate the due process right to liberty. But *Paul* v. *Davis* is manifestly inapposite to this case where petitioner has been deprived of tangible property and liberty interests.
Petitioner alleges a wrongful discharge from employment in retaliation for his exercise of First Amendment rights, mental and emotional injuries related to a denial of procedural due process, loss of reputation, and stigmatization. Thus, it is clear that what one lower court has called the "stigma-plus" test of *Paul* v. *Davis* (loss of reputation and loss of tangible benefit or constitutional right) has been satisfied. *Dennis* v. *S & S Consolidated Rural High School District,* 577 F.2d 338 (5th Cir. 1978); *McKnight* v. *SEPTA,* 583

Petitioner has also alleged that respondent caused criminal proceedings to be initiated against him, proceedings which were admittedly terminated when the courts found no probable cause for the complaints. (Complaint, ¶¶10, 11, 15, A. 4; Answer, ¶15, A. 9). The record, of course, is incomplete in the absence of discovery or the taking of evidence with respect to the question of how widely these allegations against the petitioner were publicized. Petitioner, however, alleged embarrassment and impairment to his reputation in his complaint. (Complaint, ¶18, A. 5).

While it is true that a majority of the Justices of this Court have indicated that a post-termination hearing may be sufficient due process with regard to a deprivation of liberty caused by damage to reputation, *Arnett* v. *Kennedy, supra,* at 157 and at 171, fn. 6 (Powell, J., concurring), the situation presented in the instant case has never been before the Court. Where local law specifically provides for detailed procedures prior to termination, including a formal investigation and an evidentiary hearing, the decision to discharge an employee is cast in a rather different light than where no such procedures are provided. That is, to the extent the general public or co-workers are aware of the due process protections accorded government workers, discharge implies that the employee has already had the opportunity to "clear his name," *Board of Regents* v. *Roth, supra,* at 573, n. 12, *Arnett* v. *Kennedy, supra,* at 157, but has failed to do so.

F.2d 1229 (3d Cir. 1978); *Davis* v. *Village Park II Realty Co.*, 578 F.2d 461 (2d Cir. 1968).

It should be clear, of course, that *Paul* v. *Davis* involved no First Amendment considerations, thus on that ground alone distinguishing the instant case where the allegations evidence a retaliatory discharge for exercise of free speech. See, *Perry* v. *Sindermann, supra.*

For this reason, petitioner submits that the failure to afford him a hearing in the present case prior to discharge was a denial of his procedural due process rights and that the subsequent administrative hearing which he was given was insufficient to protect those rights.

Carey v. *Piphus, supra,* makes manifest the compensable nature of petitioner's injuries as a result of the violation of his rights to due process of law. Petitioner claims that as a result of the abridgement of his due process rights he "has suffered and continues to suffer stress, anxiety, embarassment and impairment to his reputation" (Complaint ¶18, A. 5), injuries which *Carey* recognizes as compensable. Moreover, the deprivation of petitioner's procedural due process rights is compensable by nominal damages even should he be unable to prove actual injuries at trial:

> Because the right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed, see *Boddie* v. *Connecticut,* 401 U.S. 371, 375 (1971); *Anti-Fascist Committee* v. *McGrath,* 341 U.S. 123, 171-172 (1951) (Frankfurter, J., concurring), we believe that the denial of procedural due process should be actionable for nominal damages without proof of actual injury. We therefore hold that if, upon remand, the District Court determines that respondents' suspensions were justified respondents nevertheless will be entitled to recover nominal damages no to exceed one dollar from petitioners.

Accordingly, based on explicit provisions of Puerto Rican law, petitioner had a legitimate claim of entitlement to continued employment, absent sufficient cause

for termination, and is entitled to damages for the violation of his right to a pre-termination hearing.

B. Petitioner's complaint states a claim for relief under the First Amendment by alleging that he was discharged in retaliation for an exercise of protected Speech.

The First Amendment prohibits retaliatory discharge from public employment for the exercise of speech protected by the First Amendment. See, e.g., *Perry* v. *Sindermann, supra; Board of Regents* v. *Roth, supra; Mt. Healthy City Board of Education* v. *Doyle, supra,* at 283-284 (1977); *Elrod* v. *Burns,* 427 U.S. 347 (1976); *Givhan* v. *Western Line Consolidated School District,* _____ U.S. _____, 99 S.Ct. 693 (1979); *Pickering* v. *Board of Education,* 391 U.S. 563 (1968); *Madison School District* v. *Wisconsin Employment Relations Commission,* 429 U.S. 167 (1976). In *Perry* v. *Sindermann, supra,* this Court ruled that even when a public employee lacks a contractual or tenure right to his position, discharge or non-renewal caused by the government's retaliation for the exercise of First Amendment rights is actionable:

> For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially his interest in freedom of speech.
>
> *Id.*, at 597

There is a three step process for analyzing claims of retaliation against a public employee based on speech. First, the claimant must show that his or her expression was constitutionally protected. If the government argues that conflicting, legitimate state interests related to claimant's employment justify the termination, a balancing of the claimant's rights and the state's interests is required. A court must weigh "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering* v. *Board of Education, supra,* at 568; see *Givhan* v. *Western Line Consolidated School District, supra.* In this balance, only state interests "significantly greater than [the state's] interest in limiting a similar contribution by any member of the general public" can be substantial enough to outweigh the employee's right of expression. *Givhan, supra,* 99 S.Ct. at 696; *Pickering, supra* at 570, 572-573. Second, the claimant must show that the protected conduct was a substantial or motivating factor in the decision or action taken against him. Third, if claimant has met the first two requirements, the government employer can still defeat the claim by showing by a preponderance of the evidence, that the same action would have been taken even in the absence of the protected expression. *Givhan, supra,* 99 S.Ct. at 697; *Mt. Healthy, supra.*

Under this test, petitioner has pleaded a cause of action under the First Amendment.[27] *First,* petitioner's

[27] The specific, well-pleaded allegations of the Complaint set forth with more than ample particularity the factual basis for petitioner's First Amendment claim. Petitioner alleges facts that demonstrate the retaliatory nature of his discharge, and he explicitly complains that his "constitutional rights . . . not to be arbitrarily

speech—truthful criticism of public officials for the serious abuse of their powers—is a classic example of speech that comes within the protection of the First Amendment. See, e.g., *Givhan* v. *Western Line Cons. School District, supra; Pickering* v. *Board of Education, supra; Mount Healthy City School District* v. *Doyle, supra; New York Times* v. *Sullivan,* 376 U.S. 254 (1964); *Perry* v. *Sindermann, supra; Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 (1976).

In *Perry* v. *Sindermann, supra,* at 598, this Court ruled that allegations that a teacher's non-retention was based on testimony before legislative committees and "other public statements critical of the Regents' policies" "present a bona fide constitutional claim." There are no distinctions in First Amendment terms that can be drawn between the speech at issue in *Sindermann* and that which is presented in the instant case, see *Givhan, supra,* and therefore petitioner has stated a claim for relief under the Constitution.

Second, it is clear that balancing of petitioner's free speech interests against the countervailing interests which might be asserted on behalf of the police department cannot be done on the bare pleadings of this case. There is absolutely no record upon which to base a determination of whether the respondent has any legitimate countervailing interest. There is no evidence upon which to make the determination of what impact

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discharged from public employment" were violated (Complaint, ¶17, A. 5). These allegations surely encompass a First Amendment claim, particularly for purposes of the pleading requirements of the Federal Rules. See, e.g., *Conley* v. *Gibson,* 355 U.S. 41 (1957); *Hickman* v. *Taylor,* 329 U.S. 495 (1947); *Hillsborough Township* v. *Cromwell,* 326 U.S. 620 (1946); *Southpark Square Ltd.* v. *City of Jackson,* 565 F.2d 338 (5th Cir. 1977).

the petitioner's speech might have had on morale within the police department or on public confidence in the department. Cf., *Pickering* v. *Board of Education, supra.* Nor is there any evidence of the impact of petitioner's speech on his relationships with his co-workers or with the respondent as his superior officer. In such circumstances, further factual development of the case is required. *Givhan* v. *Western Line Consol. School District, supra.*[28]

Third, there is no evidence on the record to suggest that petitioner was discharged for anything except the substantive content of his charges and criticisms.[29] At a minimum, therefore, under *Mt. Healthy,* the respondent would bear the burden of proving by a preponderance of the evidence that the discharge would have been effected even in the absence of the protected conduct. *Givhan, supra,* at 697; *Mt. Healthy, supra.*

Accordingly, petitioner's Complaint states a cause of action for a retaliatory discharge for First Amendment protected activity under well-settled law. Should he prevail on his First Amendment claim at trial, petitioner would be entitled to damages, even though he has already received back pay for the period of his discharge. Petitioner would be entitled to compensatory damages for any emotional or mental suffering he incur-

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[28] Indeed, to the extent the pleadings speak to this issue, it would appear from the fact that petitioner was reinstated to his former position that the government of Puerto Rico has explicitly acknowledged that any interests that could be asserted by the respondent are *not* sufficient to overcome petitioner's freedom of expression.

[29] To the extent petitioner's complaint can also be read to allege that he was discharged for testifying truthfully under subpoena for a defendant in a criminal case, his First Amendment claim is only strengthened.

red as a result of the denial of his First Amendment rights and nominal damages for the denial of the right, and he may be entitled to punitive damages as well. *Carey* v. *Piphus, supra; Donovan* v. *Reinbold, supra,* at 743; *Glasson* v. *City of Louisville, supra,* at 912.

III. Conclusion

For all of the foregoing reasons, petitoner requests this Court to reverse the decision of the First Circuit Court of Appeals affirming the dismissal of this action and to remand for further proceedings.

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FOR ARGUMENT

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5601

CARLOS RIVERA GOMEZ, *Petitioner,*

v.

ASTOL CALERO TOLEDO, *Respondent.*

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

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BRIEF FOR RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5601

CARLOS RIVERA GOMEZ, *Petitioner,*

v.

ASTOL CALERO TOLEDO, *Respondent.*

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

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BRIEF FOR RESPONDENT

TO THE HONORABLE COURT:

Now comes Respondent through its undersigned attorneys and respectfully prays that the opinion and judgment of the United States Court of Appeals for the First Circuit rendered in these proceedings on August 7, 1979, be affirmed.

OPINION BELOW

The references made to the opinion and judgement of the United States Court of Appeals for the First Circuit rendered on August 7, 1979 and to the unreported opinion and judgment of the United States District Court for the District of Puerto Rico, dated on October 23, 1978, as stated by the Petitioner in his Brief, are correct, and in order to avoid unnecessary repetitions we adopt them herein.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Brief for Petitioner.

STATUTES INVOLVED

The Federal Statutes involved are: 42 U.S.C. sec. 1983, 28 U.S.C. sec. 1343 and sec. 1 of the Fourteenth Amendment to the Constitution of the United States of America. The pertinent provisions of those and other related statutes are included in the Brief For Petitioner.

QUESTION PRESENTED

Whether the plaintiff in a civil rights action filed under 42 U.S.C. § 1983 must allege bad faith on the part of the defendant in order to state a claim for relief.

STATEMENT OF THE CASE

This civil rights action for damages was filed at the United States District Court for the District of Puerto Rico by Carlos Rivera Gomez, formerly and still currently an agent with the Police Department of the Commonwealth of Puerto Rico, against Astol Calero Toledo, Superintendent of the same, seeking monetary compen-

sation for supposed damages and injuries said to be caused by an alleged deprivation of some of his constitutional rights when he was temporarily discharged from the police force on July 14,1976.

In April 1975, the petitioner, not acting within his official duties, and on account of knowledge admittedly obtained by unauthorizedly tapping private telephone conversations with other police agents, made serious imputations regarding two other agents of the Bureau of Criminal Investigations of the Police Department, concerning what he considered as false evidence supposedly obtained and offered as evidence admissible in Law by those two fellow agents in a criminal case under *their* investigation.

An official inquiry was conducted as a result of the petitioner's imputations, but since it failed to substantiate them, it was recommended that petitioner not be returned to his former duties in the city of Ponce, that he be reprimanded in writing and that he be instructed to abstain from involving himself, on his own whim, in investigations officially assigned to other agents. Accordingly, the petitioner was transferred to the Police Headquarters in San Juan and later, as an instructor, to the Police Academy.

During the term of petitioner's duties as an instructor in the Police Academy, he testified on behalf of the defendant in a criminal case against one of the most sought after criminals in the island, declaring there that the case had been "fabricated" by two investigative agents; but, notwithstanding petitioner's testimony as to the alleged "fabrication", on March 27, 1976 the jury found the defendant, nevertheless, guilty of first degree murder.

Then, as a result of plaintiff's having admitted in court that he had, on his own, tapped private telephone conversations of the agents allegedly involved in the above mentioned "fabrication", the judge presiding the criminal case ordered that the tapes be produced, and subsequently, criminal charges were brought against petitioner for violation of article 149 of the Puerto Rico Penal Code,[1] pursuant to a report and recommendation of Assistant Prosecuting Attorney Jorge Roberto Feliciano, on May 20, 1976.

By letter of May 26, 1976, respondent Astol Calero Toledo, then Superintendent of the Police of the Commonwealth of Puerto Rico, acting in his official capacity, by virtue of authority vested on him under Law No. 77 of June 22, 1956, as amended, (25 L.P.R.A., secs. 221-221t), and regulations issued thereunder, and in due compliance with Sec. 14(E) of Act 26 of August 22, 1974 (25 L.P.R.A., sec. 1014(e), Cumulative Pocket Supplement of 1978), suspended petitioner temporarily from employment with the Police Department while he was being investigated on account of the aforementioned criminal charges.

On July 14, 1976, petitioner was duly discharged from employment for violating Rules 3 and 26, Chapter 7, Sec. 1, Regulations of the Police of Puerto Rico by

[1] 33LPRA 4190 (1978 Cumulative Pocket Supplement) effective since January 22, 1975, which reads:

> "Every person who for his own or another's benefit, or to injure another, utilizes, negotiates, speculates, employs or otherwise makes use of a personal private message which has been unlawfully intercepted, violated, or recorded or who in any way induces or attempts to induce any agent, officer or employee of a telephone or telegraph company to disclose the contents of any private communication shall be punishable by imprisonment not exceeding three years or a fine not exceeding five thousand dollars or both in the discretion of the Court."

contesting unwarrantedly the honesty, integrity and competence of two fellow member of the corps, making improper manifestations denigrating their dignity, and observing an injurious or disorderly conduct, thus harming the Police Department. Said discharge was in accordance with the applicable provisions of Commonwealth Law, which provides for appeal before the Investigation, Prosecution and Appeals Commission (CIPA), and petitioner was duly informed of his right to appeal from that order.

Petitioner appealed from his discharge by respondent Astol Calero Toledo's letter of July 14, 1976, before the Investigation, Prosecution and Appeals Commission, (CIPA), which after a hearing, and by ruling of December 1, 1976, revoked Astol Calero Toledo's administrative order discharging petitioner from employment and ordering his reinstatement to his former position, *with salaries accrued,* all of which was complied with as it was due.

Claiming that, as result of the shortlived[2] discharge from his former employment, he had suffered stress, anxiety, embarassment and impairment to his reputation, the petitioner, on July 14, 1977 sued the respondent for compensatory, punitive and exemplary damages before the United States District Court for the District of Puerto Rico.

The District Court dismissed the case on October 23, 1978, since from the complaint's deficient allegations, no set of probable facts were apparent which would entitle the plaintiff, here petitioner, to the relief claimed, because it had not even been alleged that the Superintendent of Police had acted in bad faith or that

[2] Three and a half months.

his conduct in suspending and discharging him had been purposefully discriminatory or reckless.

Petitioner appealed before the United States Court of Appeals for the First Circuit, which on August 7, 1979 affirmed that decision, considering that, since public officials acting in their official capacity enjoy qualified immunity from liability for damages if they have acted in good faith, the failure of plaintiff (here the petitioner) to allege bad faith, malice or even recklessness, plus the lack of any facts on which to make such an inference, did not allow for the Superintendent (here the respondent) to be held lialable for damages, noting also as significant, the fact that plaintiff (here the petitioner) did not move to amend the complaint in the light of the applicable law after it was dismissed by the District Court.

SUMMARY OF ARGUMENT

Petitioner holds simply that in order for him to state a claim for relief in a civil rights case against a public official filed under 42 U.S.C. sec. 1983, he did not even need to allege bad faith on the part of the Respondent, just because in many other circuits cases such pleading had not been required and because this Honorable Court has suppossedly held the opposite.

Respondent holds that such contentions are not true, that no constitutional right of the petitioner was ever violated by him, and that in order to state a valid claim for relief, petitioner's complaint should have at least included allegations of facts which, if proven, would have entitled him to the relief claimed, and also, that, since respondent pleaded that he had acted in good faith and in his official capacity while discharging petitioner from his job, he actually enjoyed qualified im-

munity from liability for damages, concerning which, petitioner failed even to allege bad faith, malice or recklessness in the discharge of his official duties, or to evoke any facts from which such a tendencious inference could be made.

Only temerity, or a less than diligent pursuit of petitioner's own interests left the granting of a writ of certiorari, available as a last recourse, which otherwise would have been unnecessary if the petitioner, in the light of the applicable law, had just moved to amend his complaint (dismissed for failure to allege enough) when faced merely with the need to comply with a basic pleading requirement. The decision of the Court of Appeals is not in conflict with any of the applicable decisions of this Honorable Court, is not in direct conflict, since it can be distinguished, due to differences in the concurring facts, with decisions of other courts of appeals on matters of federal law, it does not pose an irreconcilable conflict in the application of rules of law and only represents a correct exercise of independent judgment by the First Circuit.

The decision of the court below might also have been issued as well in view of self evident assertions such as that respondent's decision was made as Superintendent of Police, consonant with what was provided in all applicable laws, rules and regulations, considering what he, acting only upon recommendation arising from an official inquiry, had perceived then to be more convenient to the spirit and reputation of the Police Department, which had been harmed by the irregular and unorthodox activities of petitioner who (after tapping private telephone conversations) had made, in an improper way manifestations denigrating the dignity, honesty, integrity and competence of two

fellow officers, "observing an injurious or disorderly conduct".

In the absence of any clear violation of statutory due process and lacking the necessary allegations of factual circumstances to support the equally absent imputations of bad faith, the allegations of the complaint could only be deemed as insufficient to assert a civil rights claim against the Superintendent of Police for, at best, all that could be established thereof, through a complaint that chose fatally to ignore a basic pleading requirement, is that the Superintendent had incurred in an administrative error while discharging the plaintiff, a situation to which, shortly after, adequate remedy was granted when petitioner was reinstated to his former position, with salaries accrued, upon an order issued by the Investigation, Prosecution and Appeals Commission of the Police Department.

The decision of the Court of Appeals did not affirm a decision where an assumption of qualified immunity had been automatically applied, though it might have seemed so, since, though it went unsaid, the concurrence of such a sine qua non factor as good faith was given its due credit only after the District Court could ponder on the validity of the affirmative defenses put forward by the respondent, which rested simply on his full compliance with the applicable dispositions of law.[3]

Thus, The Court of Appeals did not err, when it concluded that the failure of plaintiff to allege bad faith plus the lack of any facts on which to make such an inference, was fatal, mainly in view of the fact that respondent had raised effectively the issue of qualified immunity.

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[3] Please refer to Memorandum of Law in Support of Motion to Dismiss filed by defendant, (here respondent), on July 3, 1977 Docket Entry #12.

ARGUMENT

I. The Plaintiff In An Action Under 42 U.S.C. § 1983 Needs To Plead Bad Faith On The Part Of The Defendant In Order To State A Claim For Relief.

A. Petitioner did not allege any real "violation of his constitutional rights committed under color of Law" and did not state a valid claim for relief under 42 U.S.C. § 1983.

A plaintiff may have a cause of action under 42 U.S.C. Sec. 1983 and 28 U.S.C. 1343 *only* if he can sustain that his rights under the laws of Constitution of the United States have been violated by a person acting under color of law. In the present case, the only Constitutional right that plaintiff alleged was violated,[4] was his statutory due process, which he alleged is granted to him under Act 26 of August 22, 1974 (25 LPRA, Sec. 1014-b), but we respectfully believe that petitioner was dealt with, administratively, in accordance to the method the said *state* law provides for the imposition of disciplinary measures. (Please see: *Curtiss* v. *Peerless Ins. Co.*, 299 F. Supp. 429 (D.C. Minn. 1969); *Krum* v. *Sheppard,* 255 F. Supp. 944 (W.C. Mich. 1966); *United States* v. *Biloxi Municipal School District,* 219 F. Supp. 691 (S.D. Miss. 1963); affd. 326 F.2d 237 (CA 5, 1964), cert. denied 397 U.S. 929 (1964); *Javits* v. *Stevens,* 382 F. Supp. 135 (DCSDNY 1974). Also see; *Heller* v. *Roberts,* 386 F.2d 382 (CA 2, 1967); *Hopkins* v. *Wasson,* 227 F. Supp. 278 (DCED Tenn. 1964) affd. 329 F.2d 67, (CA 6, 1964) cert. denied 379 U.S. 854 (1964).

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[4] Please refer to paragraph 17 of the Complaint.

Act No. 26 of August 22, 1974 (supra) did not require the celebration of a formal administrative hearing prior to the imposition of disciplinary measures upon members of the police force, but only and simply, the "opportunity to be heard" (which petitioner has not even alleged that it was denied). Anyhow, in *Judith Rodríguez de Quiñones, et al.,* v. *Honorable Julio César Pérez, etc., et al.,* decided by the United States Court of Appeals for the First Circuit on March 30, 1979 the Court held that a pre-termination hearing was not required if opportunity for a post-termination hearing was offered. This point became moot for petitioner once he was reinstated by Respondent, thus the dismissal of petitioner without a pre-termination hearing (even if it had been actually required by law, which it was not) could never be construed as violative of his rights to due process, and much less could it be implied that respondent Calero's participation in that decision amounted, even by a long stretch of imagination, to a demonstration of bad faith, reckless or even purposefully discriminatory conduct.

We respectfully understand that petitioner was duly granted his statutory due process, a fact confirmed by the Ruling of the Investigation, Prosecution and Appeal Commission of December 1, 1976, reversing the Superintendent's decision of July 14, 1976 (discharging plaintiff from his job) "and ordering his reinstatement to his former position with salaries accrued." (Please Refer To: Paragraph 16 of the Complaint in which plaintiff himself recognizes this situation), thus his allegations in this respect were moot, irrelevant, unnecessary and in any case insufficient.

It is well settled that in order to state a claim upon which relief may be granted pursuant to 42 USC Sec.

1983, a plaintiff must at least allege facts which, if proven, will suffice to establish he was deprived of a federally protected right as a result of the breach, by defendant, of his legal duty. In order to prevail, a plaintiff must establish that he has been deprived of a right guaranteed by the Federal Constitution. (Please see: *Crabtree* v. *Brennan,* 466 F. 2d 490 (6th Cir. 1972). He must further establish that defendant caused the alleged constitutional deprivations while acting under color of state law. (Please see: *Downs* v. *Dept. of Public Welfare,* 368 F. Supp. 454 (E.D. Pa. 1973). Ultimately, he must *show* that a duty existed, imposed upon the defendant by law, and that he breached it.

In the present case, the caption of the Complaint included as defendants: The Commonwealth of Puerto Rico and The Police of the Commonwealth of Puerto Rico. Besides there being the Eleventh Amendment bar, as to these defendants, as we have previously analyzed in other writing on record, there was also a total absence of factual allegations or specific acts of these defendants which might merit a remedy from the District Court. Nowhere in the instant Complaint could there be found an allegation, as to these defendants specifically, and, except for the caption of the case, these defendants were not named or alleged against by plaintiff in the entire Complaint. It was respectfuly submitted that plaintiff, having failed to make factual allegations as to the involvement of these defendants in the alleged damages for which he asked indemnity, had failed to properly assert a cause of action against them under the Civil Rights statutes, since in a Civil Rights Complaint, the allegations made must state the specific facts upon which relief may be granted against these defendants. (Please see: *Parish* v. *National Collegiate Assoc.,* F. 2d 1028 (5 Cir., 1975); *Curtiss* v. *Everett,* 489 F. 2d 516 (3 Cir. 1973), cert. den. 416 U.S. 985; *Ser-*

zypho v. *Chase Manhattan Bank,* 46l F. 2d 14 (3 Cir. 1971); *Metcalf* v. *Ogilvie,* 436 F. 2d 361 (7 Cir. 1970); *Guedry* v. *Ford,* 43l F. 2d 660 (5 Cir. 1970); *Hoffman* v. *Holden,* 268 F. 2d 280 (9 Cir. 1959).

It was submitted, in accordance with all the above mentioned contentions, that the instant complaint failed to state specific acts of the Superintendent of Police which would amount to deprivation of any of plaintiff's federally protected rights, and as such should also be dismissed, since he was merely an alter ego of the Commonwealth of Puerto Rico and thus not a "person" amenable to suit under 42 U.S.C. § 1983.

In *Conley* v. *Gibson,*355 U.S. 41 (1957) this Honorable Court stated that a complaint should not be dismissed for failure to state a clain unless it appear beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief, but it must be conceded that in its Decision and Order dismissing the instant case, the District Court specified precisely that "no set of probable fact are apparent which would entitle Plaintiff to the relief claimed."

May we respectfully ask: How can any plaintiff be expected to set himself to prove something which has not even entered his mind? How can it be inferred that somehow he would ever venture to prove something that he has not even claimed to have happened?

The purpose of pleading may ultimately be to facilitate a proper decision on the merits, but what if, as in the instant case, the very insufficiency of the pleading precluded the District Court from seeing any merit at all in the complaint? How could the Court be blamed?

B. The decisions of this honorable court do not in fact establish that qualified immunity is just an affirmative defense which must only be pleaded by the defendant in an action under 42 U.S.C. § 1983.

The instant case does not happen to be one where a decision of a Court of Appeals clearly fails to apply Supreme Court decisions, neither deliberately or because of error or oversight.

There is not any direct conflict between the decision of which review is being sought by petitioner and any decision of this Honorable Court (who as a matter of fact, has not yet squarely declared how the burden of proof falls when the immunity issue is raised), since it was precisely based on decisions of its own, such as those in *Scheuer* v. *Rhodes,* 416 U.S. 232 (1974), *Pierson* v. *Ray* 388 US 547 (1967) and *Wood* v. *Strickland,* 420 US 308 (1975).

In *Monroe* v. *Pape,* 365 U.S. 167 (1961), cited by petitioner, it was held only that a civil right plaintiff did not have to allege a willfull violation of constitutional rights or a specific intent to violate constitutional rights.

The instant case was dismissed mainly because from the complaint's deficient allegations, no set of probable facts were apparent which would entitled plaintiff, here petitioner, to the relief claimed, and not because he might have merely failed to allege a specific intent to violate or a willfull violation of his rights. Petitioner not only failed to allege bad faith then, and to prove with particularity any willfull violation of his rights, but, more significantly, he failed even to state with particularlity any prima facie violation at all to his constitutional rights, be it willfull or not, while at the same

time, respondent, spontaneously raised the issue of immunity putting it forward as a defense.

The dismissal of plaintiff, here petitioner, was not *willfully* effected. It took place only upon completion of an administrative investigation, in which plaintiff had the opportunity to be heard, and as a result of the recommendations made to the Superintendent of Police pursuant to said investigation.

In *Pierson* v. *Ray,* 386 U.S. 547 (1967), this Honorable Court held that defendants *would have available* to them the defense of good faith, which was put forward by respondent in the instant case, and while it noted that a complaint should not be dismissed for failure to state that the officers had a specific intent to deprive a person of a federal right, it can not be presumed either that the instant case, was dismissed *only* on those grounds, since here, the court also had the benefit of considering the reasonableness and validity of the affirmative defenses put forward by the respondent.

Respectfully we deem that it can not be said justly that the court below held that the plaintiff must *negate* in his complaint the existence of the defendants' qualified immunity, when what was actually held there, is that he had only to allege that the defendant had acted in bad faith, leaving upon the defendant the initiative of stating that he had access to a qualified immunity since he had acted only in good faith within the scope of his official duties.

In *Scheuer* v. *Rhodes,* 416 U.S. 232 (1974) this Honorable Court held that there is no "*automatic* assumption" that defendant public official have acted in good faith, and that such good faith can not be taken for granted.

The decision of the Court of Appeals below does not contradict at all this language of *Scheuer* v. *Rhodes,* since at the District Court, whose decision was affirmed by it, such "assumption", far from being automatically applied, and since such good faith, far from being taken for granted, were given both their due credit only after the court could ponder on the validity of the affirmative defenses put forward by the respondent.

In *Wood* v. *Strickland,* 420 U.S. 308 (1975), this Honorable Court held that *where the applicable constitutional principles were settled,* a plaintiff need not show *malice* on the part of a defendant, in order to prove a claim. This poses no conflict with the decision in the instant case, (where the applicable constitutional principles were not settled at all), and which obviously deemed that the complaint had not been specific and factual as to the claims made failing to comply with a basic pleading requirement. It was underscored that the pleader would have been entitled to relief not by actually showing malice but merely alleging that the respondent had acted in bad faith.

Petitioner cites *Butz* v. *Economou,* 438 US 478 (1978), but that case, besides contributing a deep historical analysis of the immunity defense, does little if anything at all to bolster his contentions, while on the contrary, as we see in *Procunier* v. *Navarette,* 434 US 555 (1973), this Honorable Court conclusively affirmed the granting of a summary judgment in a case where the defendants had raised the defense by motions supported by affidavits. This had a direct bearing on the instant case, where the defendant raised the same defense in his answer to the complaint (Nov. 10, 1967) and on his Motion to Dismiss filed on July 3, 1978, supported nonetheless by direct citations of the laws, rules and regulations applicable which stood by themselves.

C- The fact that most of the courts of appeals place on the defendant the burden of pleading qualified immunity has no bearing on the instant case, where the defendant, here respondent, took gladly upon himself that burden.

There is not any vital conflict between the decision as to which review is sought, and that rendered by other courts of equal rank. In the instant case we shall see that the alleged conflict supposedly giving rise to the petition is not a true one, and that it does not, in fact, even exist as such.

There might be some differences in principle, but not a real conflict in the actual application of rules of law.

There is also support, in the Fifth Circuit, for the position that plaintiffs have the burden of negating qualified immunity, but we respectfully venture, that in all circuits, plaintiffs would gladly forward their cause by assuming the burden of contradicting or negating any claim of qualified immunity once it has been put forward and fundamented by a defendant, as it was in the instant case.

In *Cruz* v. *Beto,* 603 F.2d 1173 (5th Cir. 1979), quoted by the Petitioner, the court went as far as to state that under some circumstances, the plaintiff had the burden of *piercing* qualified immunity by pleading and proving an abuse of authority or bad faith, once such immunity had been established by the defendant *by virtue of asserting* that his questioned decisions were made in his official capacity, based on what he perceived to be a security need of the institution of which he was Director. (In the instant case, the Superintendent of

Police did exactly the same, asserting that he had acted in his official capacity based on all laws, Rules and Regulations applicable, which he proceeded then to cite and explain). The court agreed that the plaintiffs had to carry that burden, since to deny the defendant qualified immunity protection unless he demonstrated that his actions were above the bench work of legal good faith, would make the concept of qualified immunity "a meningles embellishment."

It must be born in mind that in the instant case, the respondent gladly took upon himself the burden of stating and explaining his good faith, even when the plaintiff had failed not only to mention "it with that many words," but even to imply any bad faith on his part, concerning respondent's official participation in his discharge.

None of the cases cited by petitioner pose an unsolvable conflict with the instant decision below, due to the particular factors concurring here, where not only the petitioner failed to allege anything which would entitle him to the relief claimed, but also, more significantly, where the respondent successfully put forward an affirmative defense of good faith based on strict complaince with all applicable laws, rules and regulations which explained and justified his behavior all by themselves.

The applicability of decisions in other cases invoked by petitioner does not bear closer scrutiny when it is considered that most of them did not deal with how the burden of proof falls *when* the immunity issue is raised, but rather delve on who should actually raise it.

In *Skenan* v. *Board of Trustees of Bloomsburg State College,* 558 F2d. 53 (3rd Cir. in banc, 1976).

Cert. den., 429 US 979 (1976), originally cited by Petitioner as "the most directly in conflict with the decision below", the court, considering questions of burden of proof, held that the burden is on the defendant official claiming official immunity, to come forward and to convince the trier of fact, that official immunity should attach.

Is it not just that what respondent did in the instant case when he came forward in his Answer to the Complaint, stating as an affirmative defense and explaining how at all times he had acted in compliance with the applicable provisions of Law and in the good faith performance of his official duties?

Is there any real conflict between the aforementioned case and the decision below, just because here, the trier of facts, after considering the pertinent dispositions of all laws and regulations invoked, was convinced that official immunity should attach? Of course not, and the same applies to two of the other cases cited by petitioner, like *Safeguard Mutual Insurance Co.* v. *Miller,* 472 F 2d 732 (3rd Cir. 1973), and *Thompson* v. *Burke,* 556 F2d 231, 3rd Cir. 1977).

In *Bivens* v. *Six Unknown Named Agents,* 456 F2d 1339 (2d. Cir. 1972), also cited by petitioner as "probably the leading case on the good faith defense in § 1983 actions among lower federal court decisions", the Court merely held that public officials have no *absolute* immunity from suits for constitutional deprivations (something that no one ever claimed in the instant case) and that it is a defense to allege and prove good faith (an affirmative defense which was brought before the court by respondent in the instant case).

May we respectfully ask: Where is the real conflict?

There is none, and of course if there were any, it would not be irreconcilable at all. The same applies to *Laverne* v. *Corning,* 522 F2d 1144 (2d Cir. 1915), also cited by the petitioner.

In *McCray* v. *Burrell,* 516 F2d 357 (4th Cir., in banc), (1975), cited by the petitioner, it was held that qualified immunity was a matter of defense. In the instant case, it was in effect brought up by the defendant, here respondent, as an affirmative defense.

In *Bryan* v. *Jones,* 530 F2d 1210 (5th Cir., in banc 1976), Cert. denied 429 U.S. 865 (1976), it was held that good faith is a defense (one that was alleged by Respondent in the instant case) and that a plaintiff need not *prove* its absence to make out a prima facie case. In the instant case the petitioner failed first not only to prove but even to allege such absence and later to contradict the presence of good faith once it had been invoked, claimed and explained by respondent.

Is there any similarity at all? Certainly petitioner must concede that there is a difference between not needing to prove anything beforehand, and failing later to contradict something that has been already claimed and explained to the subsequently evident satisfaction of a court.

In *Rainer* v. *Short,* 578 F2d 621 (5th Cir. 1978) 99 S.C. 1425 (1979), the Court of Appeals approved a jury instruction placing the burden of proving the good faith defense on the defendants.

Respectfully we deem that there is no real conflict between a decision that merely requires plaintiffs to allege something, and another one that places on defendants the burden of contradicting later such allegation by proving that the contrary was true. In fact it could be said that both complement each other.

In *Glasson* v. *City of Louisville,* 518 F2d 899, 907-910 (6th Cir. 1975) *Cert. den.* 423 U.S. 930 (1975) and in *Jones* v. *Penegan,* 459 F.2d 81 (6th Cir. 1972), cited by the petitioner, the courts characterized qualified immunity as an affirmative defense, which was just and exactly the way respondent qualified it in his answer to the complaint.

In *Tritsis* v. *Backer,* 501 F2d 1021 (7th Cir. 1974), *Brubaker* v. *King,* 505 F. 2d 534 (7th Cir. 1974). *Boscarino* v. *Nelson,* 518 F2d 879 (7th Cir. 1975), also cited by the petitioner, qualified immunity is treated as a defense, something that poses no real conflict with the decision below in the instant case, which besides treating the aforementioned immunity likewise, merely sets the allegation of absence of an element to which it is conditioned, (good faith), as a pleading requirement.

In *Landrum* v. *Moats,* 576 F2d 1320 (8th Cir. 1978), Cert. den. 439 US 912, cited by the petitioner, it was held that, as in the case of any other affirmative defense, the burden of proving good faith (as an element of the defense, to the jury's satisfaction) was on the defendant. In the instant case, such burden was spontaneously borne also by the defendant and if, as stated there, the validity of the defense is "orinarily" a question for the jury, in the instant case, since the affirmative defense rested on the strict compliance with all applicable rules and regulations, we respectfully deem that such question was really for the judge.

In *Given* v. *Baker,* 576 F2d 245 (9th Cir. 1978), it was held that the plaintiff needs only to make out a prima facie case of a constitutional violation, and then the burden shifts to the defendant. In the instant case, good faith was brought forward by respondent as an affirmative defense, even when petitioner had not really made out a prima facie case of a constitutional violation.

The actions of the Superintendent of Police herein involved were in strict compliance with the applicable provisions of law, within the bounds of his official authority, and far from being a "blatant disregard of his agency's procedural requirements," they constituted a valid and lawful discharge of his official duties which, particularly after a speedy and adequate administrative remedy rendered plaintiff whole, could not and should not be utilized as the basis for a civil rights claim.

In *Donovan* v. *Reinhold,* 433 F2d 738 (10th Cir. 1970), it was held only that good faith *would* be a defense, something that we do not dispute, since that does not preclude the fact that it *could* also be a pleading requirement.

In *Martin* v. *Duffe,* 463 F2d 464 (10th Cir. 1972), it was held that good faith most be put forward as a defense, something that was done in the instant case.

In *Dellums* v. *Powell,* 566 F2d 167 (D.C. Cir. 1977), Cert. den. 438 U.S. 916 (1978) reh, den. 439 U.S. 886 (1978); *Apton* v. *Wilson,* 500 F. 2d 83 (D.C. Cir. 1974) and *Zweibon* v. *Mitchell* 516 F.2d 594 (1975), Cert. den. 425 U.S. 944 (1976), it was also held that the burden of proving qualified immunity is on the defendants. This does not preclude the fact that an imputation on the contrary should precede such protestations of immunity.

There is no unresolvable conflict between the above decision cited and the instant decision below, nevertheless, the fact that such decision might somehow conflict with that of other appellate courts on any issue did not constitute an adequate reason for arousing the attention of this Honorable Court.

As it was stated in The *Monaco* v. *Carbon Black Inc.*, 359 U.S. 180 (at 184): "While this court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial, Resolution here of the . . . [Issue in conflict among the circuits] can await a day when the issue is posed less abstractly." So, the fact that some circuits may have established different pleading requirements can be more properly considered as a correct exercise of independent judgment concerning only allegations that can not be construed as placing the burden of proving anything on anyone but the most concerned part.

D. The court below was correct in holding that bad faith should have been an element of petitioner's pleasings in his claim for relief under 42 U.S.C. § 1983.

Dismissal of plaintiff was effected only upon completion of an administrative investigation, in which he had the opportunity to be heard, and as a result of the recommendations made to the Superintendent of Police pursuant to said investigation. How could it have been so lightly deemed as willfull on his part, when respondent acted only upon valid counsel properly issued by the pertinent official board.

It should be noted here that the persons who actually conducted the aforementioned administrative investigation and those who formulated the pertinent recommendations thereof, are not parties to the present action although they should be, and are indispensable pursuant to the Federal Rules of Civil Procedure, but nevertheless, the reinstatement of plaintiff to his former

position with back pay accrued effected by the Investigation Prosecution and Appeals Commission (C.I.P.A.) in accordance with the applicable provisions of law, far from constituting evidence of bad faith or purposeful discrimination on the part of the Superintendent, established beyond doubt that he was willing and able to face the facts, concede that he had incurred in an administrative error and set himself immediately to the task of setting it straight.

All the actions of the Superintendent of Police herein involved were in strict compliance with the applicable provisions of law, within the bounds of his official authority, and constituted a valid and lawful discharge of his official duties.

Absent any claim or proof on the contrary, we are bound to presume that any government official is acting, as expected, within the scope and limitations of his authority, according to all applicable Laws, Rules and Regulations or at least, when facing a mistake, we should presume first that it may have been motivated by error rather than by bad faith. (See *Joaquin Mendoza Aldarondo* v. *Puerto Rico Government Employees Assistant,* 94 P.R.R. 538 (1967).

In the instant case we understand that some of the allegations in the Complaint as to Superintendent Calero were highly conclusory and, as such, not sustained at all by law. (Please Refer to Paragraphs 10, 11, 12, 14 of the instant complaint.) That other allegations in the Complaint as to the Superintendent, were only stating that the Superintendent acted in accordance with Act 26, 1974 which created the Law of the Police, and the Puerto Rico Police Regulations of 1968, which were the two statutes and Rules then in force which provided for the Police and the Superintendent to act as aabide

themselves by. (Please refer to paragraphs 1, 6, 12, 13 of the Complaint.)

Nowhere in the complaint was Respondent Calero charge specifically with having acted in bad faith. It was never said that his conduct was reckless or purposefully discriminatory, while on the contrary, he asserted, not only that he had acted in good faith in the performance of his official duties, but also explained positively how the applicable provisions of law had been dutifully complied with.

As we can see, his good faith, far from being automatically acknowledged in the eloquent absence of any imputation of bad faith, was conceded in full sight of the scope of his official duties as stated in the above cited Laws and Regulations and the alleged correctness of their discharge. Plaintiff then failed totally in fulfilling his affirmative obligation to allege and prove that the Superintendent of Police had acted otherwise.

It is therefore plainly evident that the District Court did not lightly presume, neither simply took for granted, the fact that respondent had acted in good faith. His qualified immunity, based mainly on it, was not born from an "automatic assumption" supposedly applied to a certain type of situacion, but from the affirmed and *uncontested* essential fairness, and correctness of his performance while discharging his official duties.

As stated in the Decision of the Court of Appeals:

> "Nowhere in the lengthy recitation of facts is there any reference to bad faith, malice or recklessness or facts on which such an inference could reasonable be based." . . . "the complaint does not set forth facts alleging such wrongdoing by defendant as to raise an inference of bad faith. *Diaz González* v. *Colón Gonzáles,* 536 F.2d 453, 450, (lst Cir. 1976)."

It was only after deeming that it must be assumed that when a plaintiff is represented by counsel, the complaint is drown in the light of the applicable law and contains the pertinent fact, that the Court of Appeals stated that:

> "The failure of plaintiff to allege bad faith, malice or recklessness in so many words, plus *the lack of any facts* on which to make such an inference is fatal." (Emphasis supplied)

Act No. 26 of August 22, 1974 did not require the celebration of an administrative hearing prior to the imposition of disciplinary measures upon members of the police force, and thus, the dismissal of petitioner without a formal pre-termination administrative hearing cannot be construed as violative of any of his rights and much less could it be said that Respondent Calero's participation in adopting a decision that was recommended to him by others in charge of the official inquiry, could amount, even by a long strecht of imagination, to a demonstration of bad faith, reckless or even purposefully discriminatory conduct.

E. The allegation that defendants must have the burden of pleading official immunity because the information on which the defense is based is uniquely within their control does not have any bearing on the instant case where the defendant gladly assumed the burden of pleading qualified immunity, and where the statement of his defense was obviously based on the letter of the applicable regulations or on information filed on public records easily available to the plaintiff since they even figured on his own.

The petitioner has stated that the mere fact that defendant Calero occupied an executive position within the Commonwealth government does not automatically accord him a qualified immunity, but the fact is that in the instant complaint Astol Calero was mentioned only in his official capacity as Superintendent of Police, acting in discharge of his official duties, which as such, sufficed in our judgment for the District Court to dismiss, as to defendant Calero, the present action, *since* it was not even hinted that he had breached in any way his official duties as such.

While absolute immunity has been provided to judicial and certain cuasijudicial officers as well as state legislators, the courts have been noticeably reticent about extending such broad protection to officials of the executive branch such as defendant in the case at bar. See *Scheur* v. *Rhodes,* 416 U.S. 232 (1974); *Harrison* v. *Brooks,* 446 F.2d 404 (1 Cir. 1971); *Cobb* v. *City of Malden,* 202 F.2d 701 (1 Cir. 1953). As to these officials, where independent judgment and discretion are involved, the courts have permitted only a qualified immunity based upon good faith performance of their duties as they saw them. *Robert* v. *Williams,* 456 F.2d 819 (5 Cir. 1973); *Carter* v. *Carlson,* 447 F.2d 358 (1971), rev'd on other grounds sub nom. *District of Columbia* v. *Carlson,* 409 U.S. 418 (1973).

The defense of qualified immunity, which is available to local, state and federal law inforcement officers, protects the respondent from liability for damages if he acted with a good faith belief, based upon reasonable grounds, that the measures he took were correct or necessary, *Maiorana* v. *MacDonald,* Slip Opinion 78-1424 decided on April 18, 1979, (1 Cir); *Kostka* v. *Hogg,* 560 F.2d 37, (1 Cir. 1977); *Butz* v. *Economou,* 98

S. Ct. 2894, 46 L.W. 4952 (June 29, 1978); *Pierson* v. *Ray,* 386 U.S. 547 (1967).

Thus, while money damages may be maintained against such officials, petitioners have the obligation to sufficiently allege and prove that defendants' conduct was either "purposefully discriminatory", *Harrison* v. *Brooks,* supra, 446 F.2d at 407, "knowing or reckless", id., or "willfull, *Ka-Harr, Inc.* v. *Huck,* 345 F. Supp. 54 (E.D. Wis. 1972). Also in *Gaffney* v. *Silk,* 488 F.2d 1248 (1 Cir. 1973) the court stated as follows:

> ". . . It is a clear rule in this circuit that liability will attach only where defendants subjectively realized (that their action) would result in depriving the plaintiff of a right or privilege secured by the constitution of the United States". (*Cobb* v. *City of Malden,* supra, 202 F.2d at 707 (1953)).

To succeed on a claim for damages under § 1983, a plaintiff must show that defendants' action violated his constitutional rights and caused him compensable injury. *Carey* v. *Piphus,* 435 U.S. (1978); *Wood* v. *Strickland,* 420 U.S. 308 (1975).

Petitioner had alleged nothing from which the District Court could infer that he had suffered any form of compensable injury from the acts described in the complaint.

At the Court of Appeals, the appellee, (here respondent) contended that the requirements of *Gaffney* v. *Silk,* 488 F.2d 1248, (1 Cir. 1973), mandated the dismissal of the complaint, not merely because a qualified immunity *had actually been invoked* by defendant Astol Calero, within whose context, the insufficiency of the allegations of the complaint could be determined, but also because the element of good faith in Astol Caleros' actions, though not questioned in the com-

plaint, had definitely been before the District Court, since in the answer to the complaint the defendant stated, as an affirmative defense, that "at all times pertinent to the complaint, the Superintendent of Police had acted in compliance with the applicable provisions of Law and in the good faith performance of his official duties as an executive officer of the Commonwealth of Puerto Rico", and since, as stated in the Decision and Order, the Complaint, even when read in the light most favorable to plaintiff, completely failed not only to "prove with particularity", but even to allege that this defendant had acted in bad faith or that his conduct had been purposefully discriminatory and reckless.

Petitioner has alleged that a clear violation of statutory due process, coupled with some allegations in the original complaint, was sufficient to negate defendant's qualified immunity, but the truth is that there never was such a violation of due process (allegedly consisting in the absence of a hearing prior to his discharge), since Act 26 of August 22, 1974 does not actually grant the celebration of such a hearing and neither do the Puerto Rico Police Regulations of 1968, while it could hardly be feasible to describe the Superintendents' official actions justly as "discriminatory persecution and wrong doing" since he limited himself to the most uniform enforcement of all Laws and Regulations applicable. So there could be no evidence of bad faith per se in such a normal discharge of respondent's official duties.

Finally, the fact that, upon appeal, the C.I.P.A. revoked the Superintendent of Police, serves as proof that the plaintiff was afforded, to a full extent, the benefits of a due process that unquestionably favored him.

An exemplary decision as such could only be construed, at most, to imply that the Superintendent had incurred in an administrative error, for which the plaintiff has been already adequately compensated by being reinstated to his former position, with salaries accrued. Therefore, absent the necessary original allegations to establish bad faith and to contradict later its affirmation, the complaint was indeed insufficient to assert and sustain a civil rights claim for damages against the respondent.

II. Petitioner Has Unsuccessfully Alleged Violation Of His Constitutional Rights Under The First Amendment And Did Not Allege Any Violation Of Any Rights Under The First Amendment.

A. The discharge of petitioner without a prior formal administrative hearing was not a deprivation of property or liberty or a violation of due process of law.

As to the statutory due process supposedly vitiated by Respondent Calero's "act", paragraph 17 of the Complaint read as follows:

> "17. That plaintiff's discharge without prior hearing was an act in violation of Law No. 26, of August 22, 1974 which law requires the celebration of administrative hearing prior to imposing disciplinary measure against members of the force and/or of his constitutional rights to a procedural due process of law and further violated plaintiff's right not to be arbitrarily discharged from public employment."

The respondent submitted that this particular allegation was not sustained anywhere or in anyway by

law. The contents of Act 26, 1974 (supra) do not grant the celebration of an administrative hearing prior to the imposition of disciplinary measures against members of the Police Force. Act 26 (supra), at its pertinent part, provides for the method to be followed in the imposition of disciplinary measures, and divides it in two: one for light shortcomings and one for serious shortcomings. (Please refer to Section 12, 13 and 14 of Act 26, supra). In no part of these sections of Act 26, supra, aforecited can it be found the administrative hearing that plaintiff affirms to exist, or his entitlement to it. There is only one reference to an opportunity for a defendant in those proceedings "to be heard", (not a formal administrative hearing) and that is in Section 14, part (b) which reads as follows: "The Superintendent, after examining *and analyzing the record, and after giving the defendant an opportunity to be heard,* shall decide the case either by acquitting the defendant or by imposing the punishment he deems advisable as provided in subdivision (d) of this section." (Emphasis supplied.)

We respectfully believe that, in no way, the aforementioned section could be misconstrued to imply that Law 26 (supra) requires "the celebration of an administrative hearing prior to imposing disciplinary measures against members of the force", and petitioner has not even alleged that he was denied the above cited opportunity.

Besides all the contentions stated above, we respectfully understand that petitioner was duly granted his statutory due process, a fact confirmed by the Ruling of the Investigation, Prosecution and Appeal Commission of December 1, 1976, repealing the Superintendent's decision of July 14, 1976 (discharging plaintiff from his job) "and ordering his reinstatement to his former posi-

tion with salaries accrued." (Please refer to Paragraph 16 of the Complaint in which plaintiff himself recognizes this situation).

In view of the fact that petitioner was reinstated to his former position, with back pay, by the Investigation, Prosecution and Appeals Commission of the Police Department, we respectfully submit that petitioner was not and is not further entitled to any other remedy from the courts since he obtained all the remedies he claimed for in the administrative hearing at the Investigation, Prosecution and Appeals Commission, and he has been fully indemnified for the damages he suffered as a consequence of the alleged act performed by respondent the Superintendent of Police, upon petitioner's receipt of all the salaries accrued while he was discharged So, it can not be said, at all, that he has been deprived either of his liberty or his property.

B. Petitioner's complaint did not state a specific claim for relief under the First Amendment since he did not allege that he was discharged in retaliation for an exercise of protected speech.

In paragraph 17 of his complaint, petitioner alleged that his discharge further violated his right not to be arbitrarily discharged form public employment, but he did not plead that his discharge had constituted a retaliation for any previous exercise of a First Amendment right, as protected speech, on his part.

The uncontested fact remains that petitioner was not discharged from his post in the Police Department because he exercised his freedom of speech. On the contrary, he was discharged specifically for violating Rules 3 and 26, Chapter 7, Sec. 1 of the Regulations of the

Police of Puerto Rico, by unwarrantedly denigrating the dignity of two fellow members of the corps and observing an injurious conduct, thus harming the Police Department (presumably where it could hurt most: internally in its Esprit de Corps, its morale and, externally, on its reputation, its public image and the trust and confidence that the whole community had in its law and order branches of its government.)

There is no evidence on the record to suggest that the petitioner was discharged for the *substantive* content of any of his previous charges and criticisms. On the contrary, the explicit reasons given for it, reveal that he was discharged for his unjurious conduct and for the damaging way in which, not acting within his official duties, he chose to engage in objectionable acts (like tapping private telephone conversations with fellow police officers) which escalated into the deplorable succession of events that originated the instant case.

The fact that petitioner was promptly reinstated in his former position, with salaries accrued, constitutes sufficient indication of the respect that his constitutional rights commanded with the respondent, who acted likewise solely upon a ruling of the Investigation, Prosecution and Appeals Commission of the Police itself.

CONCLUSION

Although this Honorable Court has not spoken directly to the issue. We deem that the logic to justify placing on a plaintiff the burden of pleading bad faith on part of a defendant rest upon the fact that, in the absence of such bad faith, the defendants' actions would not have rendered him liable for damages. As such, without the concurrence of that very bad faith, the plaintiff would even lack a valid cause of action. No

wonder the First Circuit has considered the allegation of bad faith a basic pleading in cases as the instant one.

This is not to be construed as implying that after being accused of acting in bad faith, a defendant may not bear the burden of pleading that the contrary was true, and explain to the Court why, when and how he came to believe that he was doing right when in fact he did wrong.

Pleading bad faith on the part of the defendant may be the plaintiff's burden, while pleading good faith on his part and belaying plaintiff's contentions may remain the defendants' burden, but this, only after he has been charged first.

The fact remains that no one should be required to put forward a defense against imaginary imputations which have not even been formulated, or to state his position concerning possible or probable issues which have not been raised yet in a case against him.

For all the above stated reasons, respondent respectfully requests that the decision of the First Circuit Court of Appeals affirming the decision of the United States District Court for the District of Puerto Rico dismissing the instant case be affirmed.

Respectfully submitted,

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Assistant Solicitor General

At San Juan, Puerto Rico, March 25, 1980.

PROOF OF SERVICE

I hereby certify that on this same date a copy of the foregoing Brief for Respondent has been served to Michael Avery, attorney for petitioner, at Two Park Square, Boston, Massachusetts, 02116; David Rudovsky, attorney for petitioner, at 1425 Walnut Street, Philadelphia, Pennsylvania, 19102; and José L. Rodriguez Mangual, attorney for petitioner, at Condominio Le Mans, Avenue Muñoz Rivera 602, Hato Rey, Puerto Rico, 00918; Leon Friedman, Attorney for Amicus Curiae, Hofstra University, School of Law, Hempstead, N.Y. 11550; and Charles S. Sims & Bruce J. Ennis, Attorneys for Amicus Curiae, American Civil Liberties Union Foundation, 22 East 40th Street, New York, N.Y., 10016.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5601

CARLOS RIVERA GOMEZ,

Petitioner,

—v.—

ASTOL CALERO TOLEDO,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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IN THE
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CARLOS RIVERA GOMEZ,
Petitioner,

-v-

ASTOL CALERO TOLEDO,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the First Circuit

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AMICUS CURIAE

INTEREST OF AMICUS*

The American Civil Liberties Union is a nationwide, nonpartisan organization of over 200,000 members. It exists solely for the purpose of protecting the civil rights and liberties of Americans. Since 1920, one of its constant concerns has been the need to provide adequate legal mechanisms to protect

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* Letters of consent from all parties to the filing of this brief have been lodged with the Clerk of the Court.

against, and remedy, violations of constitutionally protected rights.

Amicus has frequently appeared before this Court in support of the historic role of 42 U.S.C. §1983 in remedying violations of federal civil rights, and in deterring departure from constitutional standards. We submit this brief amicus curiae to urge the Court to preserve the role of §1983 in enforcing fidelity to the constitutional obligations of state officials entrusted with public power.

STATEMENT OF THE CASE

This action was commenced in the District of Puerto Rico based on petitioner's complaint that he was improperly discharged from employment as a police officer. Jurisdiction of the District Court was invoked pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1331.

According to the complaint, whose allegations must be accepted as true, petitioner had been employed since 1968 as a police officer with the Police Department of the Commonwealth of Puerto Rico. In the course of his work he discovered that two other police officers had obtained false evidence and used it in a pending prosecution. When he reported this to his superior officer he was transferred from his normal duties and assigned to the Police Academy. He was later exonerated by the Legal Division of the Police Department, which corroborated his accustions.

Subsequently petitioner was subpoenaed by the defense lawyer in the criminal case in which the false evidence had been given. He testified in that case in accordance with the facts as he knew them. Thereafter, and as a result of his court testimony, the Superintendent of Police of the Commonwealth of Puerto

Rico, respondent herein, filed criminal charges against petitioner for wiretapping, claiming petitioner had made his discoveries through an illegal wiretap. The criminal charges were later dismissed as lacking probable cause, and petitioner has alleged that respondent knew when he instituted them that the wiretap statute could not properly be applied to the conduct in question.

In addition to the criminal charges, petitioner was suspended and discharged, allegedly for contesting the honesty, integrity and competence of the other officers. The discharge took place without a hearing despite the fact that a Commonwealth statute gave police officers the right to an administrative hearing before imposition of disciplinary action.

In July 1977, petitioner instituted this civil rights action, alleging the facts set forth above and claiming that his substantive and procedural rights to due process of law had been violated. He also charged that the discharge was in retaliation for his testimony in the criminal case.

The complaint was dismissed by the District Court on October 23, 1978, on the ground that petitioner had not met his affirmative

obligation to allege and prove that respondent acted in bad faith. That decision was affirmed by the First Circuit, 602 F.2d 1018, 1020: "Where, as here, a public official is being sued for action taken in his official capacity, it is assumed that he wears a cloak of qualified immunity and the complaint must allege and specify facts that show bad faith and state why in this particular case the cloak was shed." The Court rejected petitioner's argument that his complaint sufficiently alleged bad faith by allegations that the respondent had knowingly deprived him of rights specifically guaranteed by Puerto Rican law.

SUMMARY OF ARGUMENT

It is the nearly universal judgement of the Courts of Appeals, and implicit in this Court's decisions in Pierson v. Ray, 386 U.S. 547 (1967), Wood v. Strickland, 420 U.S. 308 (1975), and Butz v. Economou, 438 U.S. 478 (1976), that the good faith defense is a true affirmative defense, to be pleaded and proven by the defendant. Point A.

Some §1983 actions require plaintiffs to prove a particular state of mind on the part of defendant involving the issue of intent, because the constitutional right is defined as the right to be free from governmental action with a particular type of intent. See, e.g., Estelle v. Gamble, 429 U.S. 97 (1976); Washington v. Davis, 426 U.S. 229 (1976). Point B. But the good faith defense involves a very different state of mind issue. It presents not a question of willfulness or intent to commit the act, but rather the question whether the state actor had a good-faith, reasonable belief in the lawfulness of his actions. Wood v. Strickland, 420 U.S. 308 (1975). As is shown by the irrelevance of the good faith defense to suits for declaratory or equitable relief, proof of lack of "good faith" is not part of plaintiff's §1983 cause of action. Moreover, the requisite "good faith belief" in the lawfulness of one's actions may arise from a myriad of possible factors - a prior legal opinion, a recent Court decision, conversation with counsel, long-established and unchallenged administrative practice - and the defendant, not the plaintiff, is in the best position to know which

particular facts assertedly support his defense. Accordingly, because only he can effectively do so, it is appropriate to require the defendant to plead and prove the good faith defense. Point C.

Finally, in other areas of the law where good faith bars the imposition of retrospective liability, Congress and the courts have imposed on defendants the burden of pleading and proving good faith, recognizing that defendants are in the best position to adduce the facts supporting a good faith defense. Point D.

ARGUMENT

THE NATURE AND PURPOSE OF THE GOOD FAITH DEFENSE REQUIRE THAT DEFENDANT HAVE THE BURDEN OF ALLEGING AND PROVING IT.

A. The Court Below Misunderstood the Rationale of the Good Faith Defense.

The First Circuit decision is an anomaly. With only one rather confusing exception,[1] every other Circuit has held that the good faith defense is an affirmative defense which must be pleaded and proven by the defendant.[2]

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[1] In Cruz v. Beto, 603 F.2d 1178, 1184 (5th Cir. 1979), the Fifth Circuit stated that although lower government officials must plead and prove their good faith, the "director of a statewide prison system" may not have that burden. The court then held that regardless of whose burden it was, the plaintiff's proof did show bad faith. The statements on the burden of proof were therefore dictum.

[2] See Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 456 F.2d 1339, 1348 (2d Cir. 1972); Skehan v. Board of Trustees of Bloomsburg State College, 538 F.2d 53, 61-62 (3d Cir. 1976) (en banc); McCray v. Burrell, 516 F.2d 357, 370 (4th Cir. 1975) (en banc), cert. granted and later dismissed on other grounds as improvidently granted, 426 U.S. 471 (1976); Bryan v. Jones, 530 F.2d 1210, 1213 (5th Cir. 1976) (en banc); Glasson v. City of Louisville, 518 F.2d 899, 907-910 (6th Cir. 1975), cert. denied 423 U.S. 930;

(footnote continued on next page)

Although this Court has not spoken directly to the issue, its comments in Section 1983 and Bivens cases indicate that it believes that pleading and proving the good faith defense is the defendant's burden. Thus in Pierson v. Ray, 386 U.S. 547, 556, 557 (1967), Chief Justice Warren, joined by all members of the Court except Justice Douglas, wrote:

> The police officers [in Monroe v. Pape, 365 U.S. 167(1961)] did not go to trial and defend the case on the hope that they could convince a jury that they believed in good faith that it was their duty to assault Monroe and his family in this manner...We also held that the complaint [in Monroe] should not be dismissed for failure to state that the officers had "a specific intent to deprive a person of a federal right," but this holding, which related to requirements of pleading, carried no implications as to which defenses would be available to the police officers...Part of the background of tort liability, in the case of police officers making an arrest, is the defense of good faith and probable cause. (Emphasis added.)

(footnote continued from preceding page)

Tristis v. Backer, 501 F.2d 1021, 1022 (7th Cir. 1974); Landrum v. Moats, 576 F.2d 1320, 1329 (8th Cir. 1978); Gilker v. Baker, 576 F.2d 245 (9th Cir. 1978); Martin v. Duffie, 463 F.2d 464, 468 (10th Cir. 1972); Dellums v. Powell, 566 F.2d 167, 176 (D.C. Cir. 1977), cert. denied 438 U.S. 916.

More recently, in Butz v. Economou, 438 U.S. 478, 508 & n.35 (1978), this Court referred to the "defense of immunity," which could be raised by a defendant on a motion for summary judgement. It also noted that: "The defendant official may also be able to assert some other common-law or constitutional privilege." This language is inconsistent with the decision below that the plaintiff must allege and prove the defendant's bad faith in a constitutional tort action.

The First Circuit's adoption of this anomalous rule was based in part on its misunderstanding of the good faith defense. Thus, the court below confused the various mental components in a Section 1983 case, holding:

> Public officials acting in their official capacity enjoy a qualified immunity that protects them if they acted with a good faith belief based upon reasonable grounds that their actions were necessary. Or to put it conversely, a plaintiff in such an action must prove that the public official acted in bad faith, meaning with malice or recklessly. (Emphasis added.)

602 F.2d at 1020. This statement is simply wrong. It misstates the subjective portion of the good faith defense because the good faith defense protects a government official who

reasonably believes his actions were lawful, not necessary. The distinction is crucial. An army officer may believe it necessary to kill all the civilians in a war zone. But if he knows or should have known that such actions are unlawful, he has no defense. See United States v. Calley, 22 U.S.C.M.A. 534 (1973). A college president may have thought it necessary to fire the student editors of a newspaper because of their articles. But he has no defense to §1983 action unless he shows he believed he could lawfully do so. See Schiff v. Williams, 519 F.2d 257, 261 (5th Cir. 1975). The First Circuit's holding also wholly ignores the objective component of the good faith test: Was the defendant's belief in the legality of his actions reasonable under the circumstances? See Wood v. Strickland, 420 U.S. 308, 322 (1975). And it incorrectly equates "bad faith" with "malice," rather than with the absence of good faith.

The rather succinct manner in which the court below presented the test also confused those mental elements which a plaintiff must sometimes prove in order to show a constitutional violation, with mental elements which

are properly characterized as part of a defense. It is necessary to separate those elements in order to show the First Circuit's error.

B. Under Certain Circumstances, the Plaintiff Must Prove a Particular Intent on the Part of the Defendant Official to Succeed in a Section 1983 Action.

In any Section 1983 action, the plaintiff must prove the official acted under color of state law and caused an injury to his constitutional or federal rights. The plaintiff is not required to show an intent to deprive him of a specific constitutional right, but he must prove the defendant had the intent to do an act that a reasonable person would foresee would threaten a constitutional right of the plaintiff. See generally Monroe v. Pape, 365 U.S. 167, 187 (1961); Kirkpatrick, "Defining a Constitutional Tort Under Section 1983: The State of Mind Requirement," 46 U. of Cinn. L. Rev. 45 (1977). In addition, depending on the right allegedly violated, the plaintiff may have to prove that the defendant acted with a particular type of intent as part of the

proof necessary to show violation of a constitutional right. Thus, if a Fourth Amendment-false arrest or false imprisonment claim is made, the plaintiff must ordinarily prove that there was an intent to arrest or an intent to imprison. See, e.g., Bryan v. Jones, 530 F.2d 1210 (5th Cir. 1976) (en banc); Restatement of Torts, Second, §35 ("An actor is subject to liability to another for false imprisonment if (a) he acts intending to confine the other....") (Emphasis added.) If a due process, malicious prosecution claim is made, the plaintiff must prove the defendant's intent to prosecute maliciously. Hampton v. Hanrahan, 600 F.2d 600, 630 (7th Cir. 1979), petition for cert. pending, No. 79-912, 48 U.S.L.W. 3414. See also Kimbrough v. O'Neal, 545 F.2d 1059, 1061 (7th Cir. 1976) (due process claim that property was taken requires proof that government official took it intentionally or with reckless disregard). See generally L. Friedman, "The Good Faith Defense in Constitutional Litigation," 5 Hofstra L. Rev. 501, 507 n.54 (1977). This proof is analogous to the proof that tort plaintiffs must submit in a variety of intentional tort actions.

In these cases, the constitutional right at issue is defined in terms of the right to

be free from action by a government official associated with a particular type of intent. Thus the Eighth Amendment right to be free of cruel and unusual punishment has been defined as the right to be free from conduct of a state official acting with particular malice, recklessness or indifference. In Estelle v. Gamble, 429 U.S. 97 (1976), this Court held that unless a plaintiff prisoner can show "deliberate indifference to serious medical needs," on the part of prison officials, no constitutional violation has occurred. Thus the plaintiff must show more than an intent to do the acts that led to medical problems. Unless he proves "deliberate indifference," he has failed to prove any constitutional injury.

Similarly, in Washington v. Davis, 426 U.S. 229 (1976) and Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 (1977), this Court held that a plaintiff must prove discriminatory intent on the part of the government official being sued in a Fourteenth Amendment - equal protection action. This Court concluded that the Fourteenth Amendment was not violated unless the action of the official was associated with and motivated by a particular animus or intent. Unless proof of that

intent was submitted by the plaintiff, no constitutional right was implicated and a Section 1983 case must fail. Thus once again, the right is defined in terms of the right to be free of certain action associated with a particular intent.

On the other hand, there are times when no intent must be proven by the plaintiff. Thus this Court held in Baker v. McCollan, 61 L. Ed. 2d 433, 439 (1979), that there is no blanket rule on whether allegation and proof of simple negligence can support a Section 1983 action. "It may well not be susceptible of a uniform answer across the entire spectrum of conceivable constitutional violations which might be the subject of a §1983 action." Implicitly, there are some actions in which proof of intentional action is not necessary for a plaintiff to prevail, and therefore no need for him to show intent.

Conversely, there are instances where proof of the most malicious state of mind by a state officer will not help a plaintiff if his constitutional rights are not affected. Thus in Paul v. Davis, 424 U.S. 693 (1976), this Court held that a person's reputation as such was not protected by the Constitution, and presumably

even a malicious defamation by a state officer would not support a Section 1983 action. Similarly, in Baker v. McCollan, supra, this Court held that the state of mind of the sheriff was wholly immaterial since no constitutional right of the plaintiff - arrested under a facially valid arrest warrant - had been violated.

These principles do not deal with or focus on the good faith defense. They relate to volitional elements of the human mind, the intent or willfulness with which an act is done. Since tort law, the background against which §1983 must be read, has often made the intent with which an act is done relevant to liability, it is not surprising that the law makes the plaintiff shoulder the burden of proving that intent. In the same way that a tort plaintiff must prove that the defendant engaged in actions giving rise to injury and that his actions were the proximate cause of the injury, he must also in some cases prove the intent of the actor as well. He knows the actions at issue. He must also present proof of intent associated with those same actions where that is relevant. He may be aided by certain presumptions in making such proof, see Monroe v. Pape, supra, 365 U.S. at 187, but the burden is nevertheless his to meet.

C. The Good Faith Defense Involves Different Policy Considerations and a Different State of Mind Component, Generally Not Within the Knowledge of Plaintiff, and it Would Be Unfair to Impose the Burden Upon Him to Prove Its Opposite.

The good faith defense, as developed by this Court in Scheuer v. Rhodes, 416 U.S. 232 (1974), Wood v. Strickland, 420 U.S. 308 (1975), O'Connor v. Donaldson, 422 U.S. 563 (1975), and Procunier v. Navarette, 434 U.S. 555 (1978), involves totally different elements and considerations than the intent requirements outlined above. The issue in the area of good faith is always the defendant's awareness of the legality of what he is doing. As this Court wrote in Wood v. Strickland, 420 U.S. at 321, the official must be acting sincerely "and with a belief that he is doing right," that is, legally. This Court emphasized that a government official will be held liable if he knew or should have known that "the action he took within his sphere of official responsibility would violate the constitutional rights of the [citizen] affected." Id. at 322.

In Procunier v. Navarette, supra, this Court found that the right of prisoners to have their mail protected against official interference

was not clearly established in the period before 1972 when the actions at issue occurred. Thus, because the defendant prison officials "could not reasonably have been expected to be aware of a constitutional right that had not yet been declared, petitioners did not act with such disregard for the established law that their conduct 'cannot reasonably be characterized as being in good faith.'" 434 U.S. at 565.

The theory of the good faith defense is that a government official should not have to answer in damages when he was acting sincerely (with no intent to cause injury) and with a reasonable belief in the legality of what he was doing, even if he had violated the constitutional rights of a citizen. By definition, the good faith defense does not come into play until the plaintiff has proved a constitutional violation and injury to himself. At that point, as between the citizen who was injured and the government official who acted sincerely and with a reasonable belief in the legality of what he was doing, the citizen must bear the injury without compensation. Imposing liability for damages "for every action which if found subsequently to have been violative of a student's constitutional rights and to have

caused compensible injury would unfairly impose" on state officers. It would lead to "intimidation" and would "deter even the most conscientious" decisionmaker from exercising his judgement. Wood v. Strickland, 420 U.S. at 319-320. But the immunity granted is qualified, and available only if the acts were both sincerely motivated (with no malicious intent to injure) and based on a reasonable view of their legality.

It follows that a good faith defense cannot be a defense to a suit for injunctive or declaratory relief. As noted above, the good faith defense comes into play only after a constitutional violation has been found. The defense itself is a personal one to insure that government officials are not immobilized by their concern about later damage suits. But if only injunctive relief is sought, that balancing need not occur, and a court should and must order that the constitutional violation stop. It has been the universal view of the lower federal courts that good faith does not bar an injunction, once a constitutional violation has occurred. See National Treasury Employees Union v. Nixon, 492 F.2d 587, 609 (D.C. Cir. 1974): "A good faith defense

in a suit for damages brought against a federal official as an individual is seemingly established by Bivens v. Six Unknown Agents...but that defense is not assertable in the face of a quest limited to injunctive, declaratory, or mandamus relief." See also Chinese for Affirmative Action v. Leguennec, 580 F.2d 1006, 1008 (9th Cir. 1978); Eslinger v. Thomas, 476 F.2d 225 (4th Cir. 1973); Boyd v. Adams, 513 F.2d 83 (7th Cir. 1975).

These principles of the good faith defense show that the burden of proving good faith must always rest on the defendant official. It is not part of the plaintiff's proof of a constitutional violation, or it would be relevant in actions for prospective relief. It is an affirmative personal defense based upon considerations of balancing the need for vigorous action by public officials against the desire to compensate injury to a citizen by the official's actions. The purpose of the good faith defense requires, once the plaintiff has shown a constitutional violation has occurred, that the official then show the policies justifying the good faith defense apply in his case. He is the one who is conscious of his own reasons for acting and his belief in the legality of

those actions. Requiring a plaintiff to prove that mental state and knowledge as part of his case in chief is unfair, unnecessary and inconsistent with the theory of the good faith defense.

There is another reason for placing the burden of alleging and proving good faith on the official. When good faith is involved, the question is not what the actor's intent was when he committed the acts in question, but whether he had a reasonable belief in the legality of what he was doing. The calculations that enter into an official's belief in the legality of what he is doing are peculiarly within his own knowledge and control, and conversely are generally not available or accessible to the plaintiff. An official may believe that he is acting legally because of the advice of counsel, Adler v. Lynch, 415 F.Supp. 705, 714 (D.Neb.1976), Johnscn v. Anderson, 420 F. Supp. 845, 850 (D. Del. 1976). The official may have been relying on a long-established administrative regulation, see Mukmuk v. Commissioner of the Department of Correctional Services, 529 F.2d 272 (2d Cir. 1976), cert. denied 426 U.S. 911; Walker v. Hoffman, 583 F.2d 1073, 1075 (9th Cir. 1978)

("...forestry officers submitted affidavits and supporting documents which demonstrate that they followed normal procedures in terminating the appellant's occupancy of the claim site."). In Wolfel v. Sanborn, 555 F.2d 583, 589 (6th Cir. 1977), the Sixth Circuit held that a parole officer might rely on an "unwritten policy of the Parole Authority" to show his belief in the legality of his actions and thus his good faith. An official may receive an opinion from the State Attorney General to justify his actions. See Mosher v. Saalfeld, 589 F.2d 438, 441 (9th Cir. 1978) ("...Robinson checked with the State Attorney General's Office and was told he could remove the color television and oak table.").

Each one of these areas involves mental conclusions based on facts or events outside the knowledge of the plaintiff. If a defendant official is going to rely on an administrative regulation, an "unwritten policy," or an opinion of the Attorney General, then the defendant must affirmatively plead and prove their existence. A plaintiff who has shown a constitutional violation has no way of knowing on what basis a government official

may believe his acts were legal. A plaintiff cannot be expected to discover, before he brings his law suit, on what rule or regulation or opinion or previous conversation a defendant might rely. These are matters within the knowledge of the official and are generally separate from the acts that gave rise to the injury in question. As with any affirmative defense, these are matters which the defendant must introduce into the proceedings as a justification for his acts, because as a practical matter he is in the best position to adduce the relevant facts.

In the instant case, the defendant police chief may believe that particular rules or regulations provided a reasonable basis for his belief that his action did not violate petitioner's constitutional rights. He may have received an opinion of the Attorney General or some other government official. He may have been confused about the facts and may have the equivalent of a "mistake of fact" defense, if his belief was reasonable. But it would be unfair in the extreme to ask a plaintiff to guess at what the defendant relied upon, to anticipate all the possible defenses in this area, and to affirmatively plead that each did not exist. There

is no principle in law or logic to justify placing that burden on a plaintiff.

It is true there are times when the plaintiff in proving his affirmative case will necessarily have to negative any good faith defense. If a police officer arrests a citizen and the charges are later dismissed, the police officer may be sued for a Fourth Amendment-false arrest violation. In proving that there was no probable cause for the arrest, the plaintiff is also proving that the police officer acted unreasonably. As Judge Jon O. Newman has explained:

> ...[T]he victim's cause of action for an arrest in violation of his Fourth Amendment rights requires an arrest without probable cause. To make out his case, the plaintiff must establish that a reasonably prudent police officer, under all the circumstances, would not have had probable cause to believe that he had committed a crime. Then, under Bivens, the officer still has a defense if he acted in good faith and has a reasonable belief in the validity of his action, that is, if he reasonably believed that he did have probable cause. But if the plaintiff's own case requires him to show an arrest that was not reasonably based on probable cause, what does the defense mean? Surely the officer could not reasonably believe that there was probable cause for an unlawful arrest, for an unlawful arrest is by definition an arrest for which a prudent police officer could not reasonably believe there was probable cause.

Newman, "Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct," 87 Yale L. J. 447, 460 (1978).

Even in this area, the policeman's claim of probable cause may come from unknown informants or other facts of which only he could be aware. A policeman sued for an improper search may rely upon consent from a person with a joint possessory interest, see Meiners v. Moriarty, 563 F.2d 343, 349 (7th Cir. 1977). If an entry is made into the home without a warrant, the police officer may have believed there was a fleeing felon therein, see Williams v. Gould, 486 F.2d 547, 548 (9th Cir. 1973). It is impossible to catalogue all the ways in which a police officer may prove that his arrest or search was reasonable if the victim is later cleared of the charges. And it would be an impossible burden for the victim--after he has proved the violation--to anticipate every calculation that went into the officer's decision and to show that his conclusion was improper. Accordingly, the burden of proving good faith in the special sense of Fourth Amendment reasonableness, or probable cause, has always been imposed on defendants in §1983 suits alleging Fourth Amendment violations. See, e.g., Pierson v. Ray, supra, 386 U.S. at 555-557.

D. In Non-Section 1983 Cases, the Person Asserting a Good Faith Defense Has the Burden of Pleading and Proving it.

A good faith defense is not confined to cases involving constitutional torts. In many other areas of the law, a person may seek to avoid liability because of his good faith. It is almost uniformly the rule that the person whose good faith is at issue must himself allege and prove that defense.

By statute, for example, Congress has determined that a person accused of violating Section 2(a) of the Robinson-Patman Act, 15 U.S.C. §13(a), has the burden of proving that his lower price was a response to an equally low price of a competitor as provided for in Section 2(b). "...[N]othing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price...was made in good faith to meet an equally low price of a competitor...." See United States v. United States Gypsum Co., 438 U.S. 422, 450 (1978); F.T.C. v. A.E. Staley Mfg. Co., 324 U.S. 746, 759 (1945) ("... Section 2(b)...does place upon the seller the burden of showing that the price was made in good faith to meet a competitor's....")

In shareholder derivative suits, corporate directors must prove their good faith when corporate payments are made to them. "[W]here the directors have a personal interest in the application of the corporate payments, such as where they are fixing their own compensation, the business judgment rule no longer applies and the burden shifts to the directors to demonstrate affirmatively that the transactions were engaged in with good faith and were fair...." Cohen v. Ayers, 596 F.2d 733, 739-40 (7th Cir. 1979).

The rule is the same in certain areas of labor law. Thus under the Fair Labor Standards Act an employer is liable for heavy liquidated damages if he pays less than the minimum wage. He has a defense, however, if he proves his good faith belief that the law did not apply to him. The Fifth Circuit recently explained: "We understand the language of Section 11 of the Portal to Portal Act to impose upon the employer who would escape the payment of liquidated damages a plain and substantial burden of persuading the court by proof that his failure to obey the statute was both in good faith and predicated upon such reasonable grounds that it would be unfair to impose upon him more than a compensatory

verdict." Barcellona v. Tiffany English Pub, Inc., 597 F.2d 464, 468 (5th Cir. 1979).

Similarly, although taxpayers are in certain circumstances relieved of penalties for failure to file tax returns, penalties are imposed simply upon a showing of failure to file; the burden is on the taxpayer to plead and prove a good faith defense. See, e.g., United States v. Kroll, 547 F.2d 393 (7th Cir. 1977).

In these areas, the person asserting the defense of good faith is in the best position to know factually and legally on what factors his good faith was based. Thus, the law imposes on him the obligation to introduce the defense and allege the facts that show its existence. The rule should be the same in cases brought under Section 1983.

CONCLUSION

For the reasons stated above, amicus respectfully requests that the judgment of the First Circuit dismissing the complaint be reversed.

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